FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 182.

THE PENNSYLVANIA RAILROAD COMPANY; THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; THE BALTIMORE AND OHIO RAILROAD COMPANY, et al.,

Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, D. A. STICKELL & SONS, INC.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

BRIEF FOR APPELLANTS.

H. C. BARRON,
CHARLES CLARK,
A. B. ENOCH,
P. F. GAULT,
THOMAS P. HEALY,
H. H. LARIMORE,
A. H. LOSSOW,
W. A. NORTHCUTT,
L. H. STRASSER,
CARSON L. TAYLOR,
Of Counsel.

R. AUBREY BOGLEY,
FRANCIS R. CROSS,
WM. PEPPER CONSTABLE,
JOHN DICKINSON,
JOSEPH F. ESHELMAN,
Counsel for Appellants.

December 20, 1944.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

INDEX.

TABLE OF CASES CITED.

TABLE OF STATUTES CITED.

CONGRESSIONAL HEARINGS AND COMMITTEE REPORTS CITED.

TABLE OF MISCELLANEOUS AUTHORITIES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944. No. 182.

THE PENNSYLVANIA RAILROAD COMPANY;
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY;
THE BALTIMORE AND OHIO RAILROAD COMPANY;
CHARLES M. THOMSON, As Trustee of the Property of THE CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A Corporation;
CHICAGO, MILWAUKEE, ST. PAUL and PACIFIC RAILROAD COMPANY (Henry A. Scandrett, Walter J. Cummings and George I. Haight, Trustees);
JOSEPH B. FLEMING and AARON COLNON, Trustees of THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY;
LOUISVILLE AND NASHVILLE RAILROAD COMPANY;
G. W. WEBSTER and JOSEPH CHAPMAN, Trustees of MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY;
GUY A. THOMPSON, Trustee, MISSOURI PACIFIC RAILROAD COMPANY, Debtor;
THE NEW YORK CENTRAL RAILROAD COMPANY;
THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY;
SOUTHERN RAILWAY COMPANY;
WABASH RAILROAD COMPANY;

Appellants,

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
D. A. STICKELL & SONS, INC.

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

BRIEF FOR APPELLANTS.

OPINIONS BELOW.

The opinion of the specially-constituted District Court for the District of Maryland, *Pennsylvania R. Co.* v. *United States,* 54 F. Supp. 381, appears in the Record at page 77, and its final decree at page 102.

The report of the Interstate Commerce Commission, Division 2, *D. A. Stickell & Sons, Inc.* v. *Alton R. Co.,* 255 I. C. C. 333, is set forth in the Record at page 27, and its accompanying order at page 41.

The Commission itself made no report in connection with its order (R. 43) denying the petition of defendant railroads for reargument and reconsideration (R. 126). For convenience the report and order of Division 2 will hereinafter be referred to as the report and order of the Commission.

JURISDICTION.

The jurisdiction of this Court is invoked in accordance with the authority contained in U. S. Code, Title 28, Sections 47a and 345, for the taking of a direct appeal to this Court from the final decree of a United States District Court, made pursuant to the provisions of U. S. Code, Title 28, Sections 41 (28), 43-48, and Title 49, Section 17 (9), refusing to enjoin, set aside, annul, or suspend an order of the Interstate Commerce Commission. The final decree of the District Court was entered on March 22, 1944 (R. 102). Petition for appeal was presented and allowed on May 15, 1944 (R. 108). Probable jurisdiction was noted by this Court on October 9, 1944 (R. 477).

STATUTE INVOLVED.

The statute here involved is the Interstate Commerce Act, as amended, herein termed the Act, and particularly the provisions thereof which delimit the power

of the Interstate Commerce Commission to prescribe through routes. 49 U. S. C., Sec. 15 (3) and (4). More specifically the case involves the interpretation and application of clause (b) as added to paragraph (4) by the Transportation Act of 1940. (54 Stat. 911-912). Paragraphs (3) and (4) of Section 15 are set forth in Appendix 3 to this brief at pages 4a-5a hereof.

STATEMENT OF THE CASE.

Nature of the Case.

This is a direct appeal from the final decree (R. 102) of the specially-constituted District Court of the United States for the District of Maryland which denied and dismissed the petition (R. 3) of appellants for an interlocutory and a final injunction to suspend, set aside, and annul the order (R. 41) of the Interstate Commerce Commission, Division 2, of March 18, 1943, in its Docket No. 28647, *D. A. Stickell & Sons, Inc.*, v. *The Alton Railroad Company et al.*, 255 I. C. C. 333 (R. 27), which order required the railroads defendants therein to establish and maintain certain new through routes.*

Appellants herein (petitioners below) are thirteen trunk-line railroads which were defendants in the said proceeding before the Commission and against which the order of the Commission runs (R. 41-43). Appellees are the United States, the statutory defendant (28 U. S. C., Sec. 46), and the Interstate Commerce Commission and D. A. Stickell & Sons, Inc., interveners-defendants below.

---

*"A through route is an arrangement, expressed or implied, between connecting railroads for continuous carriage from a point on the line of one to a destination on the line of the other." *Quanah, A. & P. Ry. Co.* v. *Atchison, T. & S. F. Ry. Co.*, 211 I. C. C. 389, 390-391.

"While a joint rate is not essential to show the existence of a through route, the establishment of joint rates presupposes through routes. *Western Pac. R. Co.* v. *Northwestern Pac. R. Co.*, 191 I. C. C. 127, 131." *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 226 I. C. C. 7, 17.

Proceedings Before the Commission.

The order of the Commission, the validity of which is here involved, was made in a proceeding upon the petition of said D. A. Stickell & Sons, Inc., herein termed complainant, a corporation of the State of Maryland, engaged in the manufacture of mixed livestock and poultry feeds at Hagerstown, Md. (R. 22, 27, 41).

Complainant obtains its inbound materials, consisting of grain, grain products, and various by-products from grain elevators, grain mills, vegetable oil mills, and food manufacturing plants in Kansas, Missouri, Minnesota, Idaho, Illinois, Indiana, and Ohio. The bulk of its production moves to points in New England, eastern Pennsylvania, Delaware, and the so-called Del-Mar-Va peninsula, the latter being that part of Delaware, Maryland, and Virginia south of Wilmington, Del., and between the Chesapeake and Delaware bays. About 50 or 60 percent of its production, and about 90 percent of that part thereof that is handled by the Pennsylvania Railroad, moves to points in the Del-Mar-Va peninsula. The Pennsylvania is the only railroad serving these points (R. 28).

Hagerstown is between Cumberland and Baltimore, Md., on the main line of the Western Maryland Railway. It is served by a branch line of the Pennsylvania extending from Harrisburg, Pa., to Winchester, Va., and by a branch line of the Baltimore & Ohio extending north from Weverton, Md., on its main line. Hagerstown is also the terminus of the line of the Norfolk & Western Railway from Roanoke, Va. (R. 29).

So-called transit arrangements are maintained by the several railroads at Hagerstown whereby complainant is enabled to receive its inbound materials, mix them into feed, and ship its products to destination at the same rate (plus a transit charge) as if there had been a through shipment of the manufactured product direct from origin to destination. Where an out-of-line haul,

or "back-haul" is necessary to reach the transit point, as is the case when the route of the Baltimore & Ohio or Pennsylvania to and from Hagerstown is employed, an additional charge is made therefor. For the out-of-line haul of the Pennsylvania of 74.5 miles in each direction between Enola Yard (Harrisburg) Pa., and Hagerstown, a back-haul charge of 4.5 cents per 100 pounds is assessed (R. 29, 30).

The Pennsylvania's transit arrangement at Hagerstown on grain, grain products, and by-products was established on May 5, 1921, at the request of complainant (Ex. 45; R. 409, 410, 271-274, 338). Complainant's carload shipments of inbound materials and outbound products over the routes of the Pennsylvania have increased steadily in recent years. For 1940, the last full year for which such shipments are shown of record, 509 carloads of inbound materials were received, and 675 carloads of outbound products were shipped over the Pennsylvania's route via Enola Yard (Ex. 60; R. 459, 308, 338).

Complainant's petition (R. 22) was filed with the Commission on April 9, 1941. As amended at the hearing it sought an order under Section 15 of the Act [49 U. S. C. 15(3)] requiring defendant railroads, including these appellants, to join in the establishment of certain new through routes via Hagerstown applicable to the transportation of grain, grain products, and by-products, originating at stations in Ohio, Indiana, Illinois, Wisconsin, Iowa, Minnesota, Nebraska, and Missouri, to stations on the Pennsylvania Railroad east of York, Pa., and Fulton Junction (Baltimore), Md., and between New York, N. Y., and Cape Charles, Va., and particularly points on the Del-Mar-Va peninsula (R. 27, 28).

The new through routes specifically proposed by complainant, and subsequently prescribed by the Commission's order, were referred to as routes 1 and 2, viz.,

"(1) From the markets and origins in central territory* on The New York Central Railroad Company and its connections others than the Pennsylvania via New York Central to Youngstown, Ohio, Pittsburgh & Lake Erie to Connellsville, Western Maryland to Hagerstown, thence Western Maryland to York or Fulton Junction, and the Pennsylvania beyond; and (2) from the same markets and origins on the Wabash Railway Company and its connections other than the Pennsylvania in central territory via the Wabash to Toledo, Ohio, The Wheeling and Lake Erie Railway Company to Pittsburgh Junction, Ohio, Pittsburgh & West Virginia to Connellsville, Western Maryland to York or Fulton Junction, and the Pennsylvania beyond" (R. 31).

Over the proposed through routes complainant sought the establishment of, and the Commission prescribed, the same joint rates as applied over the direct routes of the Pennsylvania which involve no back-haul to and from Hagerstown (R. 42-43).

The complaint before the Commission did not question the reasonableness of the Pennsylvania's out-of-line charge when such service was performed, but the objective of its complaint was to escape such charge through the prescription of through routes employing the lines of the Western Maryland through Hagerstown which would not involve out-of-line or back-haul service. (R. 30-31, 259), Petition, par. XI (R. 9); admitted by answer of U. S., par. 3 (R. 54); and in effect admitted by answers of I. C. C., par. VI (R. 45), and Stickell, par. XI (R. 61).

---

*Central Territory, as stated by the Court below (R. 78) is "defined generally as that territory lying north of the Ohio River, south of the Great Lakes, east of Chicago, St. Louis, Cairo, Illinois, and west of Buffalo and Pittsburgh * * *." The Commission's order applies "from (*a*) points on the lines of the New York Central Railroad Company and the Wabash Railway Company and their connections other than the Pennsylvania Railroad Company in Ohio, Indiana, and Illinois, and (*b*) the market points of St. Louis, Mo., and Chicago, East Louis, and Cairo, Ill., when originating beyond those market points, * * *" (R. 42).

There was no evidence or other indication of record before the Commission that the proposed through routes were desired or would be used by anyone, shipper or consignee, for the *through movement* of shipments of grain, grain products, or by-products from point of origin or market point in the midwest to final destination, as distinguished from shipments of complainant which are stopped at Hagerstown for milling or mixing in transit.

For many years the authority of the Commission to prescribe through routes and joint rates deemed by it to be "necessary or desirable in the public interest" has been limited by the so-called short-haul rule which prohibits the Commission from requiring a railroad to participate in a through route which would "short-haul" it without its consent.*

The proposed through routes (prescribed in the order involved) would short-haul one or more of the defendant railroads (appellants herein) without their consent. Thus, the proposed routes would employ the lines of the Pennsylvania only east of York, Pa., and Fulton Junction (Baltimore), Md., as compared with its present routes which give it much longer hauls (R. 34). Similarly on traffic from East St. Louis, Ill., to Milford, N. J., moving over route 2, the Wabash would obtain a haul of but 437 miles from East St. Louis to Toledo, Ohio (Ex. 68, R. 468, Item 12, R. 351-358), as compared with its much longer haul from East St. Louis to Black Rock, N. Y., in connection with its present route with the Pennsylvania (Ex. 49, R. 432, 284, 338).

No railroad defendant before the Commission or appellant herein consented that the Commission might require it to participate in any new through routes which would short-haul it. Petition, par. XXIV (R. 15); ad-

* A through route is said to "short-haul" a participating railroad when its haul in connection with that through route is substantially less than the entire length of its system railroad "which lies between the termini" of the through route. See 49 U. S. C. Sec. 15 (4), the text of which appears in Appendix 3, *infra*, p. 4a.

mitted in answer of U. S., Par. 11 (R. 58), and I. C. C. par XVII (R. 48).

The application of the short-haul rule or limitation on the Commission's power to prescribe through routes is subject to certain exceptions set forth in paragraph (4) of Section 15. One of these, clause (b), the provision here particularly involved, was enacted as a part of the Transportation Act of 1940. See 54 Stat. 911-912, Sec. 10 (b). Under this exception the short-haul limitation on the Commission's power remains applicable

> "unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient and more economic, transportation, * * *."

The report of the Commission concluded that the routes sought were necessary and desirable in the public interest (R. 34), but in view of the non-consent of the Pennsylvania to be short-hauled stated that "The question of whether the Commission is precluded from prescribing the routes sought depends on whether those routes are needed in order to provide adequate and more efficient or adequate and more economic transportation" (R. 35).

Complainant did not question the adequacy, efficiency, or economy of the Pennsylvania's service over its direct routes, but only over its route via Hagerstown. As to the latter, it contended the routes sought would be more adequate, efficient, and economic *from the shippers' standpoint* (R. 36).

Based on evidence adduced by defendants to show that the present routes of the Pennsylvania are adequate, efficient, and economical, the Commission found (R. 36):

> "It maintains scheduled fast trains that operate frequently over direct routes, that do not go through Hagerstown, from the rate-break points and origins on its line and from its junctions with other carriers

in central territory to the destinations here considered. Its main routes from the west are via Pittsburgh and its Enola yard, which is across the Susquehanna River from Harrisburg. Traffic moving north, south, and east from Harrisburg is classified at that yard. An average of 65 scheduled trains and in addition thereto extra sections of those trains, extra trains, and local trains move into and out of that yard each day. Grain handled by the Pennsylvania moving to and from Hagerstown moves through that yard. Three scheduled trains operate each way daily between Enola yard and Hagerstown, and additional sections and extra trains are used when needed. *There seems to be no question but that the Pennsylvania maintains sufficiently frequent service to meet all reasonable demands and that it can and does furnish adequate facilities to handle any and all grain traffic likely to be given to it at western origins for movement over its direct routes or over its routes via Hagerstown to eastern destinations."** (Italics inserted.)

In each instance the distance from the mid-western point of origin or market point to the final destination over the direct route of the Pennsylvania was shown to be less than over either of the proposed new routes (R. 84). The proposed routes were somewhat shorter than those of the Pennsylvania via Hagerstown, but "the evidence introduced before the Commission by the carriers was uncontradicted to the effect that the prescribed new routes would substantially increase the number of participating carriers and the number of interchange services. For example, on traffic originating at points in Central Territory (including market points not served by

*While the Court below rejected the carriers' contention based on the foregoing finding—that, since the existing routes furnished adequate transportation, clause (b) did not become operative and the Commission's ultimate conclusion could not stand—it did so because of its interpretation of the law, and did not disturb the finding as such (R. 97-98).

the Pennsylvania), these routes would, generally speaking, substitute 4 or 5-line hauls for 2-line hauls via the Pennsylvania; and where the traffic did not originate on the New York Central or the Wabash, would, generally speaking, involve 5 or 6-line hauls" (R. 99).

The record also established that "the interchange expense incident to multiple-line hauls as compared with single-line hauls, is substantial. For example, via the direct route of the Pennsylvania from Chicago to Salisbury, there is no extra operating expense involved for inter-carrier interchange; whereas, under the prescribed new routes, the interchange expense is an important item, in one or more instances (depending upon the precise routing) aggregating nearly $40.00 per assumed box car equipment of 33 tons of grain" (R. 99).

The defendant railroads also introduced exhibits comparing the costs of operation over the proposed routes and the existing routes of the Pennsylvania, both direct and via Hagerstown,* for the purpose of evaluating their relative economy having consideration for their differences in distances and in the number of interchange services which the respective routes severally involved.† Although these relative cost comparisons were based generally upon a formula used by the Commission's Bureau of Statistics, and were uncontroverted on the record, the Commission's report contains no finding as to relative costs of operation over the proposed and existing routes, but disregarded the evidence on grounds which are believed to be insufficient, and which are discussed in the Argument, *infra*, p. 103.

---

* Exhibits 68 and 69; R. 468-474, 351-358.

† For the pertinency of such evidence see the statement of Joseph B. Eastman, member of the Interstate Commerce Commission and Chairman of its Legislative Committee, when testifying on February 28, 1939, before a subcommittee of the Senate Committee on Interstate Commerce (76th Cong., 1st Sess.) on S. 1085, a bill to repeal the short-haul rule, pages 9-10, quoted *infra*, pp. 62-63.

Evidence adduced by the defendant Pennsylvania of difficult and burdensome operating conditions incident to interchange with the Western Maryland at York and Fulton Junction (R. 338-351) as bearing upon the question of the comparative efficiency of operation of the routes involved, was disregarded by the Commission on the ground that it is the duty of carriers to afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines,* that such interchange facilities must be adequate to handle all traffic that may reasonably be expected to require interchange at such points, and that "It is no defense to a complaint seeking through routes necessary and desirable in the public interest to show that a carrier has failed to perform its duties to establish such facilities and that by reason of that neglect of duty it is more convenient from an operating standpoint for it to haul traffic 149 miles out-of-line" (R. 37-38). No issue under Section 3 (4) of the Act was raised by the complaint or at the hearing, nor was any notice given the parties that such issue would be tried, nor was such issue tried before the Commission. Petition, par. XIX (R. 12), answer of U. S. R. 6 (55-56).

The Commission stated its interpretation of clause (b) as meaning "adequate and more efficient and more economic from the public's or shippers' as well as the participating carriers' standpoint" (R. 40), and its ultimate finding included the following, substantially in the language of the statute:

> "We find that the two routes sought are necessary and desirable in the public interest and that they are needed to provide adequate and more efficient and adequate and more economical transportation * * *" (R. 41).

*See 49 U. S. C. 3 (4), Appendix 4 at page 6a, *infra*. Prior to its amendment and renubering by the Transportation Act of 1940, this provision was paragraph (3) of Section 3.

As will subsequently appear,* however, this ultimate finding is not supported by the necessary basic findings, viz., (*a*) that the existing through routes do not provide adequate transportation, and (*b*) that the physical transportation over the proposed routes can be performed more efficiently or more economically. The real ground of the Commission's conclusion rests on its findings that "the present route is not *as adequate* and *efficient* as the route sought, *so far as the shipper is concerned*, • • •" and that "the proposed routes would be *more economical to the shipper* • • •" in that it would save the charge of 4.5 cents per 100 pounds for the out-of-line or back-haul service of the Pennsylvania between Enola Yard (near Harrisburg), Pa., and Hagerstown (R. 40). (Italics inserted.)

The order of the Commission Division 2, of March 18, 1943, prescribing the through routes sought by complainant was made to become effective June 28, 1943, upon not less than 30 days' notice, but by interim and subsequent orders, issued from time to time, was modified so as to become effective on April 17, 1944, upon 15 days' notice (R. 477).

Proceedings Before the District Court.

Following the Commission's denial on October 4, 1943 (R. 43), of defendants' petition for reargument and reconsideration (R. 126) of the report and order of the Commission, Division 2, of March 18, 1943, appellants herein on November 4, 1943, filed in the United States District Court for the District of Maryland their petition (R. 3) for an interlocutory and final injunction setting aside, annulling, and suspending the said order of the Commission.

---

* *V. infra*, p. 72.

No testimony was taken before the District Court, but the case was presented on the record of the proceedings before the Commission which was introduced in evidence (R. 76).

The District Court concluded that the exception embodied in clause (b) "must be interpreted to mean 'adequate, and more efficient and more economic, transportation' from the shipper's as well as from the carrier's standpoint, and that, therefore, the Commission has authority under this clause, to consider and weigh the relative importance of all factors affecting both the shipper and the carrier" (R. 94).

The Court below further concluded that the Commission applied clause (b) in a manner supported by substantial evidence, that such application violates no constitutional rights of the petitioning carriers, and that the petition must be dismissed (R. 102).

In so concluding the District Court further stated:

> "In view of the nature of this case, the Interstate Commerce Commission having made findings of fact, and this Court finding substantial evidence to support the same, it is assumed that no further or other statement of the ultimate or evidentiary facts is required under Rule 52 of the Federal Rules of Civil Procedure beyond those stated in the opinion; and also that the conclusions of law herein need not be separately stated" (R. 102).

The District Court on March 22, 1944, entered its final decree (R. 102) that the Commission's order was within its statutory authority and was made upon substantial evidence and in accordance with applicable law and is in all respects valid and dismissing the complaint of petitioners (appellants) for want of equity.

Following the entry of the final decree, the petitioners made application to the District Court for a stay of the Commission's said order of March 18, 1943, pending appeal to this Court (R. 103). Upon the petitioners' undertaking "to waive, effective April 17, 1944, and pending disposition of appeal, the back-haul charge of The Pennsylvania Railroad Company on the traffic that under the Commission's said order would secure rates over the prescribed through routes not subject to back-haul charge", the District Court, by order dated March 22, 1944, stayed the operation and enforcement of the aforesaid order of the Commission pending the perfection and determination of this appeal (R. 108).

Appellants seek an order from this Court reversing the final decree of the Court below and setting aside the Commission's order on the grounds, (1) that the issue involved is the proper construction and meaning of clause (b) of Section 15 (4) of the Act, and that the interpretation given this clause by the Commission in its order, which was sustained by the Court below, is improper and constitutes error of law; and (2) that if said clause is given its proper and lawful construction, then the Commission's order is not supported by the necessary basic findings, viz., (*a*) that the existing through routes do not provide adequate transportation, and (*b*) that the performance of the transportation over the proposed routes can be accomplished more efficiently or more economically than over existing routes; and (3) that if said clause is given its proper and lawful construction, then the Commission's findings and order are without substantial support in the evidence but are contrary thereto.

NOTE:—To avoid needless repetition, such additional facts as are necessary to the Argument will be included therein with appropriate record references.

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED.

The Court below made no findings of fact or conclusions of law separate from those contained in the Commision's report and its own opinion (R. 102). The Commission's report leaves in doubt just what findings it did make, particularly with respect to the elements which are prerequisite to the applicability of clause (b) of Sec. 15 (4) of the Act. Appellants' second and third points relate to the absence of findings to sustain the Commission's order and to the absence of evidence to sustain its findings.

These circumstances required appellants to make numerous assignments of error (R. 112-120), on all of which they necessarily rely, and which are more particularly specified in connection with each of the three points of the Argument.* There are set forth below, however, the major assignments of error, arranged generally in the order in which they will subsequently require consideration in the Argument, viz.,

The District Court erred:

(3) In concluding, holding and decreeing that the said order of the Commission was within its statutory authority and was made upon substantial evidence and in accordance with applicable law, and is in all respects valid.

(16) In failing to conclude and hold that the Commission's order is based upon a mistake of law and is beyond its statutory power in that the Commission has therein and thereby required one or more railroads petitioners herein, without their consent, to participate in new through routes which short-haul them, without having found, as a prerequisite, that the existing through routes do not provide adequate transportation between the ter-

* *V. infra*, pp. 26, 72, 88.

mini thereof, and that the service of transportation between the termini can be performed more efficiently or more economically over the prescribed routes than over the existing routes.

(27) In failing to conclude and hold that the Commission's order is based upon a mistake of law in that the ultimate finding on which it rests—that the prescribed through routes "are needed to provide adequate and more efficient and adequate and more economical transportation"—is predicated upon the erroneous assumption that clause (b) of Section 15 (4) of the Interstate Commerce Act empowers the Commission to require railroads petitioners herein, without their consent, to participate in new through routes which short-haul them, upon a mere showing that such routes will be more advantageous or will result in a lower rate to a transit operator situated between the termini of the through routes and without regard to whether such through routes will be more efficient or more economic of operation than existing through routes.

(6) In failing to conclude and hold that the Commission's order is arbitrary and without warrant in law in that the Commission's ultimate finding upon which it rests, while in the language of the statute is without support in and is contrary to the evidence and is not supported by necessary quasi-jurisdictional findings.

(12) In failing to find that the Commission found that existing through routes were adequate and provide adequate transportation, and in failing to conclude and hold that, as a consequence, the Commission was not empowered to prescribe the new through routes which it has ordered, and which short-haul one or more railroads petitioners herein without their consent.

(33) In that, having interpreted clause (b) of Section 15 (4) of the Act "to mean 'adequate, and more efficient or more economic transportation' from the shipper's as well as from the carrier's standpoint," and as including

"also considerations of railroad operating efficiency and economy", it failed to conclude and hold that the Commission's order was arbitrary and without warrant in law by reason of the Commission's failure to make findings as to whether the through routes prescribed would be more efficient or more economic from a railroad operating standpoint.

(14) In failing to conclude and hold that the Commission's order is arbitrary and without warrant in law in that it rests upon a finding that the prescribed new through routes "are needed to provide adequate and more efficient and adequate and more economical transportation", although the uncontradicted evidence of record shows that the existing through routes provide adequate transportation and that the routes prescribed are less efficient and less economic of operation than the existing routes.

(22) In failing to conclude and hold that the Commission's order is arbitrary and without warrant in law in that the ultimate finding of greater efficiency and greater economy on which it rests is without support in the evidence and is directly contrary to the evidence which shows that to typical destinations the service over the prescribed routes would be slower, and transportation thereover less economic, than over the existing routes.

(36) In failing to conclude and hold that the Commission's order is arbitrary and without warrant in law, and without due process of law, in violation of the Fifth Amendment to the Constitution of the United States, in that it is predicated upon ultimate findings as to adequacy, efficiency, and economy of through routes which rest not upon the evidence but upon an erroneous finding, itself without evidence, that The Pennsylvania Railroad Company, one of the defendants and a petitioner herein, failed to perform its duty under Section 3 (4) of the Interstate Commerce Act to afford all reasonable, proper, and equal facilities for the interchange of traffic with the Western Maryland Railway, although no issue under that section

was presented or tried, and no notice was given of any such issue to be heard or determined.

(37) In failing to conclude and hold that the Commission's order is based upon a mistake of law in that in making the findings upon which it rests the Commission erroneously assumed that, in determining the relative efficiency and economy of proposed and existing routes, it might disregard evidence that the proposed routes involved the use of interchange points not consistent with efficient and economic operation on the ground that any such inefficient or uneconomic operation would constitute a failure on the part of the railroads involved to perform their duty under Section 3 (4) of the Act to afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines.

THE QUESTIONS PRESENTED.

The primary question presented for determination in this case is a novel one, and may be stated as follows:

1. Is clause (b) of Section 15(4) of the Interstate Commerce Act operative as an exception to the short-haul rule, which prohibits the Commission from establishing a through route which would short-haul a participating railroad without its consent, upon a mere showing that such new route would advantage an individual transit operator located between the points of origin and destination of the proposed through route, and who would use it not for the purpose of a continuous through shipment, but for the purpose of securing a reduced rate on shipments stopped and milled in transit, and without any findings by the Commission that the existing routes do not provide adequate transportation between the points of origin and destination and that the proposed routes can be operated more efficiently or more economically than the existing routes?

If the answer to the foregoing question is in the negative, then a determination of the following question becomes necessary:

> 2. Is the Commission's order supported by the necessary basic findings essential to support its ultimate finding, substantially in the language of clause (b), "that the two routes sought are necessary and desirable in the public interest and that they are needed to provide adequate and more efficient and adequate and more economical transportation * * *"?

If the answer to this second question is in the affirmative, then there is presented for determination the question:

> 3. Are the Commission's findings, on which its order depends, supported by substantial evidence?

SUMMARY OF ARGUMENT.

The Commission's authority to prescribe new through routes by railroad is contained in paragraphs (3) and (4) of Section 15 of the Interstate Commerce Act.* Under paragraph (3) a finding that they are "necessary or desirable in the public interest" is requisite to their establishment, but paragraph (4) contains a prohibition against the Commission's requiring any non-consenting railroad to participate in a new through route which would afford it a shorter haul than an existing route. This prohibition —known as the short-haul rule—is subject to certain exceptions, on one of which—clause (b), enacted in 1940—the Commission relied in making the order involved. Under this exception the short-hauling limitation on the Commission's power to prescribe the new through routes ordered

*Appendix 3, *infra*, p. 4a.

—which would short-haul one or more appellant railroads without their consent—is here governing and prevents their establishment

> "(b) unless the Commission finds that the through route to be established is needed in order to provide adequate, and more efficient or more economic, transportation: * * *."

The Commission stated its interpretation of clause (b) as meaning "adequate and more efficient and more economic from the public's or shippers' as well as the participating carriers' standpoint" (R. 40), and made its ultimate finding substantially in the terms of the statute, thus:

> "We find that the two routes sought are necessary and desirable in the public interest and that they are needed to provide adequate and more efficient and adequate and more economical transportation and should be established * * *" (R. 41).

In reality the Commission based this ultimate finding and its ensuing order upon findings that the new through routes would advantage an individual manufacturer of animal and poultry feed at Hagerstown, Md., intermediate between the points of origin and destination of the through routes, who would use them not for a continuous through movement of grain and its products from point of origin to destination, but to secure a lower ultimate rate or charge as applied to its combined inbound shipments of materials and its outbound shipments of feed, manufactured at Hagerstown under a transit arrangement.* The Commission made no finding that the existing routes did not provide adequate transportation, but on the contrary found that "*There seems to be no question but that the Pennsylvania maintains sufficiently frequent service to*

* Transit arrangements are described *supra*, p. 4.

meet all reasonable demands and that it can and does furnish adequate facilities to handle any and all grain traffic likely to be given to it at western origins for movement over its direct routes or over its routes via Hagerstown to eastern destinations" (R. 36). (Italics inserted.) Further, the Commission made no findings that performance of the transportation from points of origin to final destination could be accomplished by the railroads more efficiently or more economically over the proposed through routes than over the existing routes.

The argument of appellants, defendants in the case before the Commission, may be summarized as follows:

I. The Commission's order, which was erroneously sustained by the District Court, was based upon a mistake of law and, on the facts before it, is beyond its statutory power.

The nature of the interpretation of clause (b) upon which the Commission predicated its order, and which the District Court sustained, has been sufficiently indicated above. In short, it makes the advantage to an individual shipper or transit operator, particularly by way of a rate reduction, the test of the applicability of the clause to relieve from the short-hauling limitation, regardless of whether the result would ultimately be detrimental to the carriers and to the shipping public generally. That this interpretation is based upon a mistake of law is shown by a number of considerations, viz.,

(1) The plain meaning of the words used in clause (b) disallows such interpretation, and shows that the clause does not become operative as an exception to the short-hauling prohibition unless the Commission finds that the existing through routes do not furnish adequate transportation from and to the points of origin and destination thereof, and unless the transportation or carriage over the proposed through routes can be accomplished by the

railroads more efficiently or more economically than by use of the existing direct routes between such points.

(2) The definition of "transportation" in part I of the Interstate Commerce Act, which applies to railroads, shows that the term relates to the physical service of carriage and does not refer to the rates or charges to be paid for such transportation.

(3) To similar effect is the separation in the statement of the National Transportation Policy, as set forth in the preamble of the Interstate Commerce Act, of the reference to transportation and the reference to the charges therefor.

(4) The Commission's interpretation of clause (b), which makes the advantage of an individual shipper in securing a rate reduction the test of its applicability, would make the short-haul rule of no effect since in practically every case it could be shown that a new through route would yield a reduced rate to some individual shipper or transit operator—lower over the particular through route if not lower than over existing routes.

(5) The District Court's interpretation of clause (b) would accomplish the virtual repeal of the short-haul rule. Because of the holding in *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, that the term "public interest * * * has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency," the Court below concluded that clause (b) means when in the public interest, but this would be equivalent to saying that the Commission could establish through routes when in the public interest, but not if it would short-haul a non-consenting railroad, unless the through route were in the public interest!

(6) The Commission's interpretation, upheld by the District Court, imputes to Congress an intention at variance with its national transportation policy as recognized by this Court and as declared in the Transportation Act of 1940, in that it assumes that Congress would authorize

the establishment of through routes to secure a rate reduction to an individual manufacturer or shipper even though the result would be a less efficient or less economic carrier operation the burden of which would ultimately be borne by the shipping public generally.

(7) The inadmissibility of the Commission's interpretation, sustained by the Court below, is further shown by a consideration of the reasons urged in support of the short-haul rule at Congressional committee Hearings on bills seeking its repeal, and which reasons alone can explain the long-continued maintenance of the rule. These reasons show that the rule serves to protect and promote the public interest and that it is in harmony with the national transportation policy in that it tends to preserve efficient and economic operation and to discourage wasteful transportation.

(8) A particularly pertinent and significant proof that clause (b) refers to efficiency and economy of *carrier operation* and does *not* relate to the *rates charged,* is found in its legislative history. This discloses that the Senate and House committee Hearings on the bills which became the Transportation Act of 1940 contains specific reference to the separate Hearings on the Through Route bills, and that the latter Hearings plainly show that clause (b), which first appeared in the Conference Reports of the Transportation Act of 1940, had its origin in and purpose to delimit more definitely *what* through routes Congress regarded as in the public interest, and to set a more definite standard for the Commission's guidance, and that the standard contemplated by clause (b) related to *efficiency and economy of railroad operation.*

(9) In disregarding the fact that the existing direct routes furnished adequate transportation from and to the points of origin and destination and more efficient and more economic transportation than the proposed routes, and in comparing the latter only with the Pennsylvania's routes involving back-haul service to and from Hagers-

town, the District Court erred in that the comparisons contemplated by clause (b) are with the existing direct routes as indicated by the language of Section 15(4) and by decisions of this Court and the Commission.

II. The District Court erred in failing to hold that the Commission's order is not supported by essential and basic findings and in holding the contrary.

The Commission's ultimate finding in the language of the statute will not sustain its order where there is a lack of basic or essential findings.

The Commission's ultimate finding that the new routes are needed to provide adequate transportation is not supported by basic or essential findings, but is directly contrary to its finding that the present routes furnish adequate transportation.

The Commission's ultimate finding that the new routes are needed to provide more efficient transportation is not supported by any basic findings as to the relative efficiency of the prescribed and present direct routes, or that the prescribed routes would be more efficient of operation than the existing routes of the Pennsylvania via Hagerstown.

If the Commission's discussion of Section 3(4) is to be regarded as a finding that defendants have breached their duty thereunder to provide all reasonable, proper, and equal facilities for the interchange of traffic with connecting lines, then such finding is invalid as having been made without even the rudiments of a fair hearing. But even if valid as a finding under Section 3(4) it would not as a matter of law supply the lack of essential findings that the proposed routes could be operated more efficiently than the existing ones.

The Commission's ultimate findings that the prescribed routes are needed to provide more economic transportation is not supported by any basic or essential findings that transportation thereover can be performed more economically than over the existing routes.

III. The Commission's order, which the Court below erroneously sustained, is not supported by substantial evidence but is contrary thereto, and is accordingly contrary to law.

Evidence that the existing routes of the Pennsylvania, both direct and via Hagerstown, provide sufficiently frequent service to meet all reasonable demands and furnish adequate facilities to handle any and all grain traffic likely to be given to it at western origins for movement to eastern destinations was uncontroverted on the record and the facts were specifically so found by the Commission. Accordingly the Commission's ultimate finding that the new routes are needed to provide adequate transportation cannot stand, and clause (b) was not operative to relieve the application of the short-hauling limitation, and the Commission was without power to make the order.

The Commission's ultimate finding as to the greater efficiency of the new routes is not supported by but is against the evidence. Thus, complainant presented no evidence as to the relative efficiency of operation of the present and proposed routes in their entirety, and if only the portions of the present and proposed routes east of Hagerstown are compared, there is no basis of record for a finding that the latter are more efficient.

The Commission erroneously refused to consider defendants' evidence of difficult operations incident to interchange at York and Fulton Junction based on its unjustified conclusion respecting Section 3(4).

The Commission's ultimate finding as to the greater economy of the new routes is not supported by but is contrary to the evidence that the prescribed routes substantially increase the number of participating carriers and the interchange expense, and is contrary to the carriers' cost evidence which showed that performance of transportation over the prescribed routes would be less economic than over the existing routes.

ARGUMENT.

I. THE DISTRICT COURT ERRED IN HOLDING THAT THE ORDER OF THE COMMISSION WAS NOT BASED UPON A MISTAKE OF LAW AND WAS NOT BEYOND ITS STATUTORY POWER.*

As this point will proceed to develop, the Commission's order in this case, which the District Court sustained, is based upon a mistake of law, viz., upon a misinterpretation of clause (b) of Sec. 15 (4) of the Interstate Commerce Act† as a result of which the Commission exceeded its lawful power by prescribing through routes which short-haul a non-consenting railroad in violation of the short-hauling prohibition contained in Sec. 15 (4).

If by reason of a mistake of law the Commission makes an order which in the particular case is beyond its statutory power, its order is invalid and may be set aside.

Interstate Commerce Commission v. *Union Pacific R. R.*, 222 U. S. 541, 547;

Interstate Commerce Commission v. *Louisville & Nashville R. R.*, 227 U. S. 88, 91-92;

United States v. *Missouri Pacific R. Co.*, 278 U. S. 269;

Ann Arbor R. Co. v. *United States*, 281 U. S. 658, 669.

A. The Commission's Order Violates the Short-Haul Rule Unless Clause (b) Was Operative.

The grant of authority to the Commission to prescribe through routes over the lines of carriers by railroad is contained in paragraphs (3) and (4) of Section 15 of the Interstate Commerce Act, 49 U. S. C. Sec. 15(3) and (4), 54 Stat. 911-912.‡ Paragraph (3) empowers the

---

*This point is supported by Assignments of Error Nos. 1-5, 8-11, 15, 16, 18, 26-29, 31 and 34.

†Appendix 3, *infra*, p. 4a.

‡The full text of these provisions appears in Appendix 3, *infra*, p. 4a.

Commission, after full hearing, to establish such through routes and joint rates as it deems to be "necessary or desirable in the public interest, * * *." But this power is expressly limited by certain restrictions, one of which, the short-haul rule in paragraph (4), is here involved. This rule provides that the Commission shall not require any railroad, without its consent, to participate in a through route which would afford it a lesser haul than by the use of its system lines lying "between the termini of such proposed through route, * * *." Admittedly the prescribed routes will short-haul one or more railroad appellants without their consent.*

In making its order the Commission wholly based its asserted right to disregard the short-hauling prohibition upon the following exception contained in clause (b) as included by the amendment of 1940, under which the short-hauling prohibition is governing

> "(b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: * * *."

This is shown by the following statement from its report (R. 35):

> "The question of whether the Commission is precluded from prescribing the routes sought depends on whether those routes are needed in order to provide adequate and more efficient or adequate and more economic transportation."

The validity of the Commission's order therefore depends upon whether the exception contained in clause (b) was operative in the circumstances so as to make the short-hauling prohibition inapplicable.

---

* *V. supra*, p. 7.

B. The Commission's Interpretation of Clause (b), On Which Its Order Depends, and Which the District Court Sustained, Is In Error.

The Commission stated its interpretation of clause (b) as meaning "adequate and more efficient and more economic from the public's or shippers' as well as the participating carriers' standpoint" (R. 40), and made its ultimate finding substantially in the language of the clause as follows:

> "We find that the two routes sought are necessary and desirable in the public interest and that they are needed to provide adequate and more efficient and adequate and more economical transportation and should be established, * * *."

The District Court in sustaining the Commission's interpretation stated:

> "To summarize our conclusions as to the precise character of the restriction which clause (b) of Section 15(4) of the Act imposes upon the Commission's power to order the establishment of new through routes which short-haul a railroad without its consent, we are of the opinion that the exception embodied in that clause must be interpreted to mean 'adequate, and more efficient or more economic, transportation' from the shipper's as well as from the carrier's standpoint, and that, therefore, the Commission has authority under this clause, to consider and weigh the relative importance of all factors affecting both shipper and the carrier" (R. 94).

In actuality the Commission's order rests solely on findings that the prescribed through routes would be advantageous to a single company engaged in the manufacture of mixed feed at Hagerstown, which would use them not for continuous through movements from and to points

of origin and destination, but as a means of obtaining a *lower basis of rate or charge* on its inbound shipments of materials and its outbound shipments of feed, manufactured at Hagerstown under a transit arrangement. This is shown by the paragraph which precedes the Commission's ultimate finding and which reads:

> "That the present route is not as adequate and efficient as the routes sought, *so far as the shipper is concerned*, is evidenced by the fact that, in order to meet the demands of customers for prompt delivery, complainant shipped 640 cars from Hagerstown over the Western Maryland and the Reading to Elsmere Junction thence by truck to points on the Del-Mar-Va peninsula. The fact that the proposed routes would be more economical *to the shipper* is shown by the fact that the saving in transportation charges would be 4.5 cents per 100 pounds on all grain and grain products moving over those routes and transited at Hagerstown, as compared with the charges over routes of the Pennsylvania via Enola yard heretofore described" (R. 40). (Italics inserted.)

As more clearly indicating the character of the interpretation actually placed upon clause (b) by the Commission, it is necessary here to note that it made no finding that the existing routes do not furnish adequate transportation, or that the physical transportation or carriage from and to the respective points of origin and destination of the through routes could be performed by the railroads more efficiently or more economically than over the existing routes. On the contrary it expressly found that *"There seems to be no question but that the Pennsylvania maintains sufficiently frequent service to meet all reasonable demands and that it can and does furnish adequate facilities to handle any and all grain traffic likely to be given to it at western origins for move-*

ment over its direct routes or over its routes via Hagerstown to eastern destinations'' (R. 36). (Italics inserted.)

For the reasons which will now be outlined, the interpretation of clause (b) adopted by the Commission and sustained by the District Court, is based upon a mistake of law, as a result of which the Commission prescribed through routes in violation of the short-hauling prohibition of Section 15 (4) of the Act.

1. THE COMMISSION'S CONSTRUCTION OF CLAUSE (b) AS SUSTAINED BY THE COURT BELOW IS CONTRARY TO THE PLAIN MEANING OF THE WORDS USED.

The obvious meaning of clause (b) is that it makes the short-hauling restriction inapplicable only where existing routes do not provide adequate transportation and where it is shown that the physical transportation over the proposed routes can be performed more efficiently or more economically than over the existing routes.

The word "transportation" plainly means physical carriage.

It will be noted that the word "adequate" is *not* employed in a *comparative sense.* So far as this element is concerned, clause (b) is not operative unless the proposed through route *is needed* in order to provide *adequate* transportation. This necessarily means that adequate transportation is not presently available via existing routes.

The words "efficient" and "economic" are not used without qualification, but *only* in a *comparative sense* as indicated by the use of the adjective "more". Necessarily the contemplated comparisons are with existing routes.

In summary the plain common sense of clause (b) is that the carrier's right not to be short-hauled should give way when, and only when, it appears that the existing routes do not provide adequate transportation and that the physical transportation can be performed over

the proposed routes more efficiently or more economically than over the existing routes. The natural significance of the expressions "more efficient" and "more economic" as here employed contemplates a showing that the transportation to be performed can be effectuated or accomplished more readily or more easily and with a lesser expenditure of energy or expense than by use of existing routes.

2. THE DEFINITION OF "TRANSPORTATION" IN THE ACT REFUTES THE COMMISSION'S INTERPRETATION WHICH THE DISTRICT COURT SUSTAINED.

The natural significance of the term "transportation" used in clause (b), as relating to physical carriage, finds confirmation in Sec. 1 (3) (a) of the Act, 49 U. S. C. 1 (3) (a), which provides:

> "The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

This provision, which relates to physical instrumentalities and facilities of shipment or carriage and to physical services plainly indicates that the term "transportation" connotes *physical carriage as distinguished from the amount of the rates or charges for such carriage.*

3. THE CONGRESSIONAL DECLARATION OF THE NATIONAL TRANSPORTATION POLICY DISALLOWS THE COMMISSION'S INTERPRETATION OF CLAUSE (b) WHICH THE DISTRICT COURT ERRONEOUSLY SUSTAINED.

The interpretation which the Commission actually placed on clause (b), as applied in its decision, was that

this exception to the short-hauling rule might be invoked whenever a lesser rate would result to a transit operator in the territory intermediate between the points of origin and destination of the through routes, and regardless of whether existing routes furnished adequate transportation between their termini and regardless of whether the new routes could be operated more efficiently or more economically. Thus, the Commission did not prescribe the new routes because of any demand on the part of any one to use them for through transportation from origin to destination. On the contrary, the real purpose in requiring the through routes was to enable the mixed feed manufacturer at Hagerstown to secure a reduction in the rates or charges on its traffic to eastern destinations on the Pennsylvania Railroad. Based on the fiction of a through movement on which transit operations depend,* complainant's prime objective was to obviate the necessity of paying a back-haul charge for an actual back-haul movement, viz., from Enola Yard to Hagerstown and return. This was expressly admitted by complainant's counsel (R. 30-31, 259), and was implicit in the Court's basing its stay order upon the waiver of the back-haul charge pending disposition of appeal (R. 107-108).

In view of the Commission's interpretation of clause (b) as permitting it to disregard the short-hauling restriction where the prescribed through routes would produce a lower rate or charge to the Hagerstown transit operator, it is significant to note that the national transportation policy, as declared by Congress in 1940, 54 Stat. 899, makes a clear distinction as between transportation itself and the charges to be paid therefor. That declaration of policy is as follows:

---

* See *Central R. Co. of New Jersey* v. *United States*, 257 U. S. 247, 254-255, where the Court at page 257 stated:

"Creosoting in transit, like other transit privileges, rests upon the fiction that the incoming and the outgoing transportation services, which are in fact distinct, constitute a continuous shipment of the identical article from point of origin to final destination."

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; *to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers;* to encourage the establishment and maintenance of *reasonable charges* for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." (Italics inserted.)

The separation in the foregoing statement of the reference to service and *transportation* from the reference to the *charges* therefor shows that Congress regarded the two as being distinct and not identical, and that a distinction should be recognized between the physical character of the transportation to be rendered by the carriers and the amount of the charges to be paid therefor by the shipping public. The failure of the Commission and the District Court to observe this distinction apparently contributed to their erroneous construction of clause (b).

4. The Commission's Interpretation, Upheld By the Court Below, Would Make the Short-Hauling Prohibition Of No Practical Effect.

The prescription of new through routes is customarily attended, as here, by the prescription of joint rates which necessarily represent reductions under whatever basis of rates may have theretofore been applicable over the route. In fact in probably every case the prescription of through routes would provide some shipper or transit operator with a lower rate—lower over the particular route if not lower than over existing routes.

In this situation it can be appreciated that if this Court should sustain the interpretation adopted by the Commission and approved by the Court below, which in effect makes the advantage to an individual shipper the sole test of the applicability of clause (b), the short-hauling prohibition would be virtually read out of the Act, since some one would invariably obtain a lower rate over the particular route involved. Clearly this was not the result intended by Congress in incorporating clause (b) into Section 15(4).

5. The District Court's Interpretation of Clause (b) Would Accomplish the Virtual Repeal of the Provision Against Short-Hauling.

In sustaining the Commission's interpretation that clause (b) is operative if a shipper would be advantaged by the proposed through routes, the District Court noted (R. 91) that in *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, the Supreme Court had held that the term "public interest" as used in the consolidation section of the Interstate Commerce Act (49 U. S. C. Sec. 5) was not a concept without ascertainable criteria, "but has direct relation to adequacy of transportation service, to its essential conditions of economy and effi-

ciency, and to appropriate provisions and best use of transportation facilities, * * *". The Court below then seems in effect to have reasoned that since the term "public interest" as so used has direct relation to adequacy of transportation service and to its essential conditions of economy and efficiency, the use of the expression "adequate, and more efficient or more economic, transportation" in clause (b) means *when in the public interest* (R. 91-92).

The Court's conclusion in this respect would appear to produce an absurd result. According to this interpretation the Commission is empowered by Sec. 15(3) to prescribe a through route when in the public interest, subject to the prohibition against short-hauling a non-consenting railroad, which prohibition is itself set aside if the prescription of the through route is found to be in the public interest!

Such a construction of clause (b) is clearly inadmissible, since it would impute to Congress an intention to make the short-haul rule of no effect. But this is precisely what Congress refused to do when its repeal was proposed.*

It is a settled rule of statutory interpretation that a construction should be adopted which would give effect to the entire statute.† Since the interpretation adopted by the District Court would be equivalent to a repeal of the short-hauling prohibition it must be concluded that it cannot stand as against one that will allow all parts of the statute to have a reasonable and consistent effect.

For reasons to be discussed more fully in the next section of this point, it is submitted that had the Court below properly interpreted the decision of this Court in *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, it would have concluded that since the proposed through routes would have short-hauled one or more non-consenting

---

* *V. infra*, p. 7, *et seq.*

† Petition of Public Nat. Bank of New York, 278 U. S. 101, 104.

railroads, there was no basis for an ultimate finding that their establishment would be in the public interest in the absence of valid findings that existing routes did not provide adequate transportation and that transportation over the proposed routes could be accomplished more efficiently or more economically from the standpoint of railroad operation.

In passing, however, it should be noted that the Court below was unsound in its premise that a through route could be in the public interest if the short-hauling limitation properly applied.

The grant and scope of the Commission's power to prescribe through routes are set forth in paragraphs (3) and (4) of Section 15 of the Act, and these paragraphs must necessarily be read together. While in delimiting that power Congress first set forth in paragraph (3) a general grant of authority to establish through routes when deemed by the Commission to be necessary or desirable in the public interest, and, subsequently in the same section and in paragraph (4) set forth certain restrictions on that power, the method employed should not obscure the fact that the several provisions simply represent the purpose of Congress to define the scope of the power conferred.

This can be illustrated by considering the three principal limitations on the Commission's power to prescribe through routes. The first of these is found in the second sentence of paragraph (3), and provides:

> "The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character."

The second of these limitations is the short-haul rule in paragraph (4) to which reference has already been

made. The third limitation, which was enacted as a part of the Transportation Act of 1940, is also contained in paragraph (4) and reads as follows:

> "No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs."

It is submitted that a consideration of these restrictions requires the conclusion that they are not to be considered as *bars* to the prescription of through routes that *are* in the public interest, but rather as *Congressional interpretations or guides* for the Commission's use in determining *what* through routes are in the "public interest."

6. The Commission's Interpretation, Which the District Court Erroneously Upheld, Imputes to Congress an Intention at Variance With its National Transportation Policy.

In numerous cases the Supreme Court has had occasion to decide cases against the background of the national transportation policy as evidenced and expressed in the 1920 and 1940 amendments of the Interstate Commerce Act.* Prior to 1920 the main emphasis of the Interstate Commerce Act had been upon correcting discriminations against the interests of individual shippers and localities. With the 1920 legislation there became evident a broader policy on the part of Congress which looked to the protection of the long-range interests of the public even though that might conflict with the temporary advantage of individual shippers.

For example, in *New York Central Securities Corp.* v. *United States,* 287 U. S. 12, 24-25, the Court stated:

*41 Stat. 456; 54 Stat. 898.

"Going forward from a policy mainly directed to the prevention of abuses, particularly those arising from excessive or discriminatory rates, Transportation Act, 1920, was designed better to assure adequacy in transportation service. This Court, in New England Divisions Case, 261 U. S. 184, 189, 190, adverted to that purpose, which was found to be expressed in unequivocal language; 'to attain it, new rights, new obligations, new machinery, were created.' The Court directed attention to various provisions having this effect, and to the criteria which the statute had established in referring to 'the transportation needs of the public', 'the necessity of enlarging transportation facilities,' and the measures which would 'best promote the service in the interest of the public and the commerce of the people.' *Id.* p. 189 *note.* See, also, Texas & Pacific Rwy. Co. *v.* Gulf, Colorado & Santa Fe Rwy. Co., 270 U. S. 266, 277. The provisions now before us were among the additions made by Transportation Act, 1920, and *the term 'public interest'* as thus used *is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities,* question to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred." (Italics inserted.)

At page 23 of the same case, after stating that the authority to lease was sought in the view *inter alia* that it would make possible important *economies in operation,* the Court stated:

"The public interest is served by economy and efficiency in operation."

In *State of Texas* v. *United States*, 292 U. S. 522, wherein was involved an order of the Interstate Commerce Commission approving a railroad consolidation which had "direct relation to economy and efficiency in interstate operation * * *" (p. 532), the Court discussed at pages 530-531, the national transportation policy in the following review:

> "These broadening provisions of the Emergency Railroad Transportation Act 1933 confirm and carry forward the purpose which led to the enactment of Transportation Act 1920 (Title 4, 41 Stat. 474 *et seq.* We found that Transportation Act 1920, introduced into the federal legislation a new railroad policy, seeking to insure an adequate transportation service. To attain that end, new rights, new obligations, new machinery, were created. [Citing cases.] *It is a primary aim of that policy to secure the avoidance of waste.* That avoidance, as well as the maintenance of service, is viewed as a direct concern of the public. [Citing cases] The authority given to the Commission to authorize consolidations, purchases, leases, operating contracts, and acquisition of control, was given in aid of that policy. New York Central Securities Corporation *v.* United States, 287 U. S. 12, 24, 25, 53 S. Ct. 45, 48, 77 L. Ed. 138. The criterion to be applied by the Commission in the exercise of its authority to approve such transactions—a criterion reaffirmed by the amendments of Emergency Railroad Transportation Act 1933—is that of the controlling public interest. And that term as used in the statute is not a mere general reference to public welfare, but, as shown by the context and purpose of the act, 'has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities.' New York Central Securities Corporation *v.* United States, *supra*". (Italics inserted.)

To the same general effect is the decision of this Court in *United States* v. *Lowden,* 308 U. S. 225, where, in sustaining an order of the Interstate Commerce Commission, which included a condition respecting protection of labor in approving a proposed railroad consolidation, the Court stated at page 232:

> "The proposed lease in its relation to the transfer or dismissal of employees and to an adequate and efficient transportation system, is not to be viewed as an isolated transaction or apart from the Commission's plan for consolidation of the railroads. As a result of the enactment of the Transportation Act in 1920, *consolidation of the railroads of the country, in the interest of economy and efficiency, became an established national policy,* and the effective consolidation of the railroads in conformity to the provisions of the Act and to the plan of consolidation which the Commission was directed to prepare became a matter of public interest. The policy of consolidation is so intimately related to the maintenance of an adequate and efficient rail transportation system that the 'public interest' in the one cannot be dissociated from that in the other." (Italics inserted.)

In *McLean Trucking Co.* v. *United States,* U. S. , 64 S. Ct. 370, 377, this Court had the following to say with respect to the Congressional policy toward transportation:

> "The national transportation policy is the product of a long history of trial and error by Congress in attempting to regulate the nation's transportation facilities beginning with the Interstate Commerce Act of 1887. For present purposes it is not necessary to trace the history of those attempts in detail other than to note that the Transportation Act of 1920 marked a sharp change in the policies and objectives

embodied in those efforts. 'Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly those arising from excessive or discriminatory rates'; and emphasis on the preservation of free competition among carriers was part of that effort. The Act of 1920 added 'a new and important object to previous interstate commerce legislation.' It sought 'affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country.' *Dayton-Goose Creek R. R.* v. *United States*, 263 U. S. 456, 478; *Texas & P. R. R.* v. *Gulf C. & S. F. R. R.*, 270 U. S. 266, 277. And in administering it, the Commission was to be guided primarily by consideration for 'adequacy of transportation service, * * * its essential conditions of economy and efficiency, and * * * appropriate provision and best use of transportation facilities * * *.' *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 25."

After discussing the further statement of the national transportation policy as enunciated in 1940,* and after referring to the altered emphasis in railroad legislation on achieving an *adequate, efficient, and economical* system of transportation, this Court at page 381 made the following statement which clearly shows that the efficiency and economy contemplated was efficiency and economy *in operation:*

> "The Commission found, as has been noted, that the proposed consolidation would result in *improved transportation service, greater efficiency of operation and substantial operating economies.* The higher load factor on trucks, reduction in the number of trucks used and the mileage traversed would lead to *more efficient use of equipment and save motor fuel.* Termi-

* Quoted *supra*, p. 33.

nal facilities would be consolidated and used more effectively, through movement of freight would reduce costs and in a multitude of other ways the stability and safety of the service rendered would be enhanced.*" (Italics inserted.)

It must be apparent from the foregoing expositions of the national transportation policy that Congress has endeavored to protect the long-range and over-all interest of the public in obtaining adequate transportation service by the avoidance of wasteful practices and by encouraging efficiency and economy in operation, and that to this end it has made the general public interest paramount where the advantage of an individual shipper or carrier would be inconsistent therewith. In the light of this policy the intendment of clause (b) is clear. It is to provide an exception to the short-hauling restriction if transportation service over the existing routes is not adequate, and if the necessary transportation could be performed by the carriers more efficiently or more economically than over the existing routes.

As contrasted with this interpretation, which is consistent and logical in the light of the Congressional policy as to transportation, it should be noted that *the Commission's interpretation of clause (b), which was upheld by the District Court, assumes that the policy of the law places the advantage of a single shipper or transit operator above that of shippers and the public generally.* Thus, the Commission's interpretation takes no account whatsoever of the general effect from the public standpoint of what it requires in the interest of the transit operator at Hagerstown. If, for example, the substitution of the prescribed multiple-line routes, with their greater attendant interchange expense, for the single-line routes of the Penn-

* *E. g.*, tracing shipments and settlement of claims would be facilitated, congestion at shipping platforms would be reduced, the average life of the equipment would be lengthened by scientific maintenance and safety programs on a large scale, vehicles would be shifted quickly to meet peak demands on certain routes, etc."

sylvania should involve greater carrier expenditure for the performance of the transportation between origin and destination, the public interest would be disadvantaged for the benefit of the Hagerstown operator.

Such a clash of interest on the part of the general public and the individual assumes greater significance when consideration is given to the *actual results* of the Commission's order. While prescribing through routes between midwest origins or market points to eastern destinations, the ultimate purpose or objective is not the provision of new routes for *through movement*. On the contrary, through movement is not contemplated. It is the intention of the Hagerstown miller to stop the shipments in transit at that point and to make new shipments of its outbound products. While for purposes of adjusting the ultimate rates a through movement is assumed as in the case of other transit operations* the bald fact is that what is contemplated under the order is that complainant will make separate shipments into and out of its plant. This it now does over existing routes. The practical difference is that over the prescribed routes the Hagerstown operator will receive a *lower rate* than presently applicable.

It would therefore appear that the order of the Commission is based on its erroneous assumption that it is authorized to prescribe through routes not for the purpose of affording through service, but only as a device to obtain a lower rate or charge for an individual transit operator in the intermediate territory.

7. The Commission's Interpretation of Clause (b) as Sustained by the District Court is Shown to be Erroneous by the Reasons for the Long-Continued Maintenance of the Short-Haul Rule.

a. Statutory development of the short-haul rule.

The short-haul rule had its origin in the Mann-Elkins Act of June 18, 1910, 36 Stat. 539, 552.† The only

* See footnote to p. 31, *supra*.
† Appendix 1, *infra*, p. 1a.

exception to the application of the short-haul restriction as then enacted related to instances where the protection of the long-haul would result in a "through route unreasonably long as compared with another practicable through route which could otherwise be established." These paragraphs were further amended and numbered (3) and (4) of Section 15 of the Interstate Commerce Act by the Transportation Act of 1920, 41 Stat. 456, 485-486.* This amendment made two additional exceptions to the short-hauling prohibition, neither of which are here involved.

During the period before and after the 1920 amendments the Commission, with occasional exceptions,† construed the short-hauling provision as protective only of the originating carrier and of each subsequent carrier only after it had obtained possession of the traffic.‡

As amended in 1920, the short-hauling provision contained in Sec. 15(4) came before the Supreme Court for construction in *United States* v. *Missouri Pac. R. Co.*, 278 U. S. 269 (1929), known as the *Subiaco case*. That case involved an order, made by the Commission in connection with its report on further consideration in *Fort Smith, Subiaco & Rock Island R. R. Co.* v. *A. & V. Ry. Co.*, 107 I. C. C. 523 (1926), which required the establishment of through routes which short-hauled the destination carrier without its consent.§ Upon review the Supreme Court

---

*The text of these paragraphs as so amended is reproduced as Appendix 2, *infra*, p. 2a.

† See *Hayden Bros. Coal Corp.* v. *D. & S. L. R. Co.*, 39 I. C. C. 94 (1916); *Wilgus* v. *P. R. R. Co.*, 113 I. C. C. 617 (1926).

‡ See for example *Waverly Oil Works Co.* v. *P. R. R. Co.*, 28 I. C. C. 621, 630 (1913); *Flory Milling Co.* v. *C. N. E. Ry. Co.*, 93 I. C. C. 129, 134 (1924); *Fort Smith, S. & R. I. R. R. Co.* v. *A. & V. Ry. Co.*, 107 I. C. C. 523 (1926); *Routing of Grain*, 147 I. C. C. 782, 784 (1928).

§ A sketch map of the routes involved in the *Subiaco case*, and which shows a striking parallelism to the instant situation, appears at Page 126 of the printed Hearings on S. 1261 (75th Cong., 2d and 3rd sess.) before a subcommittee of House Committee on Interstate and Foreign Commerce.

held that the protection against short-hauling was not limited by the language of the law to the originating carrier or to a subsequent carrier getting possession of the traffic, but that it operated as a restriction on the prescription by the Commission of through routes which would short-haul *any* of the participating carriers.

Although the Commission, in various of its annual reports to Congress, sought an amendment which would overcome the Supreme Court's interpretation of the short-hauling provision, and although various bills were introduced in Congress for the purpose, no change was made in Sec. 15(4) until the enactment of the Transportation Act of 1940. The amendments then made included the exception embraced in clause (b), which removed the short-hauling restriction where it was made to appear and the Commission found that "the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation".*

b. The short haul rule is grounded in considerations of the public interest and the national transportation policy.

Subject to modifying exceptions enacted from time to time as necessary, Congress has maintained the short-hauling limitation on the Commission's power to prescribe through routes for a period of 34 years. In view of the Commission's repeated recommendations for the repeal of the short haul rule,† and the failure of enactment of the various bills directed to the accomplishment of that objective, the reasons presented to Congress at hearings on such bills as justification for the retention of the rule are of particular significance. These reasons are to be found

* The full text of paragraphs (3) and (4) of Sec. 15 is reproduced in Appendix 3, *infra*, p. 4a.

† See the annual reports of the Interstate Commerce Commission to Congress for the years 1929 (p. 79), 1930 (p. 79), 1931 (p. 84), 1932 (pp. 36-37, 103), 1936 (p. 108), and 1937 (p. 106).

almost exclusively in the testimony of railroad witnesses appearing before various Congressional committees at hearings on bills contemplating repeal of the short-haul rule.*

The reasons advanced by the railroad officers before the committees of Congress in support of the retention of the short-haul rule—and which alone can explain the refusal of Congress to repeal it—find their ultimate justification and validity in considerations of the public interest and of the national transportation policy. These reasons naturally group themselves under the subjects of protecting the investments and originating expense of the initial lines and the investments of destination lines in terminal facilities, the avoidance of interchange expense incident to multiple-line hauls, the promotion of efficiency and economy in operation, and of the uneconomic results of the unnecessary injection of short lines into existing through routes. In the interest of brevity the general nature of the testimony of the railroad witnesses on these several subjects is here summarized, with references to the printed Hearings where their full statements are set forth, and certain of the more significant portions of those statements will for convenience be included in Appendix 5 at pages 7a-23a, *infra*.

(1) *Protection of investment of initial carrier.*

For the purpose of opening up new territory and of developing traffic, railroads have invested millions of

---

* See Hearings before Senate Committee on Interstate Commerce (74th Cong., 2d Sess.) on S. 1636, March 10 and 11, 1936.

Hearing before Subcommittee of House Committee on Interstate and Foreign Commerce (74th Cong., 2d Sess.) on H. R. 5364, March 31 and April 1, 1936.

Hearings before Subcommittee of House Committee on Interstate and Foreign Commerce (75th Cong., 2d and 3d Sess.) on S. 1261, Dec. 16, 17, 1937, and April 5-8, 1938.

Hearings before Subcommittee of Senate Committee on Interstate Commerce (76th Cong., 1st Sess.) on S. 1085, Feb. 28 and March 1, 1939.

Hearing before Subcommittee of House Committee on Interstate and Foreign Commerce (76th Cong., 1st Sess.) on H. R. 3400, April 18, 1939

dollars in branch lines constructed or acquired to serve new agricultural developments, oil fields, coal and other mineral deposits, and lumber producing territory. These branch lines generally could not exist or be profitably operated as separate and independent railroads. In making the necessary outlay to provide such a branch or feeder line, a trunk line is ordinarily justified only on the assumption that it will be permitted to carry over its main lines the traffic which it has so developed, if its own routes are not unreasonably long. If there were no assurance that a trunk line would be allowed to haul the traffic so originated as near to destination as its lines might run, but on the contrary were forced to surrender it to a competitor after only a short haul, the effect would be to take away from all trunk lines the incentive to risk their capital in the development and service of new territories and to jeopardize their investments in branch and feeder lines. See excerpts from statements of Paul P. Hastings, President of the Atchison, Topeka & Santa Fe Railway system, F. R. Newman, Vice President, Great Northern Railway Company, and R. J. Doss, Traffic Manager, Atlantic Coast Line, at hearings on S. 1261, in Appendix 5, *infra*, pages 7a-10a, and references there given to statements of E. W. Soergel, Assistant Freight Traffic Manager of the Chicago, Milwaukee, St. Paul & Pacific Railroad, and D. R. Lincoln, Assistant to Chief Traffic Officer, Missouri Pacific Lines, at said hearings.

(2) *Protection of initial lines in the operating expense of originating traffic.*

Railroads that originate traffic, particularly of an agricultural or perishable character, which must be shipped within a limited season or period, commonly assemble empty cars in the origin territory in advance of the actual movement, frequently hauling them empty for long distances in order to take care of the business

promptly when offered for shipment. Occasionally it occurs that weather conditions will so affect a crop about ready to be harvested as to reduce substantially the number of cars to be shipped and to leave unused much of the empty equipment assembled for its anticipated movement. If a railroad originating this character of traffic had no assurance of being able to retain its long haul to or in the direction of its destination, it would lose much of the incentive to incur the expense necessary to protect its prompt movement, and as a result the service to the shipping public would correspondingly suffer. See excerpt from statement of D. R. Lincoln, Assistant to Chief Traffic Officer, Missouri Pacific Railway, at Hearings on S. 1085, Appendix 5, *infra*, pages 11a-12a.

(3) *Protection of investments of destination lines in terminal facilities.*

Trunk lines which terminate large amounts of freight have large sums invested in terminal facilities. Some of these relate to certain classes of traffic which require special attention, such as fruits and vegetables, ore docks at lake ports, and docks and marine facilities for interchange of traffic with water carriers at ocean ports. These investments have been made by the individual carriers in anticipation of obtaining a reasonable haul on the freight using such facilities. The value of such investments, or the incentive to make future investments in this type of property, would be seriously impaired if the carriers making them had no assurance of performing a substantial proportion of the line-haul service. See excerpts from statements of Harry Wilson, Vice President, Traffic Executive Association—Eastern Territory; R. O. Small, General Freight Agent, Chicago & North Western Railway; and F. R. Newman, Vice President, Great Northern Railway; at Hearings on S. 1261, Appendix 5, *infra*, pages 12a-14a.

(4) *Avoidance of interchange expense incident to multiple-line hauls.*

Economical operation of the railroads is in the interest of the public at large, which ultimately must bear the burden of supporting and maintaining the transportation system, and therefore the element of avoiding unnecessary interchange expense has been given special emphasis by railroad officers when appearing before Congressional committees in opposition to repeal of the short-haul rule. This is epitomized in the statement of E. W. Soergel, Assistant Freight Traffic Manager of the Chicago, Milwaukee, St. Paul & Pacific Railroad, at the Hearings on S. 1261:*

> "The *establishment of a joint route for traffic that a one-line route can handle without undue circuity is an economic waste because joint traffic is more expensive to handle than is local traffic and the greater the number of carriers in a joint route, the greater the expense.*" (Italics inserted.)

The Freight Traffic Report of the Federal Coordinator of Transportation, Joseph B. Eastman,—quoted at length by railroad witnesses at the Through Route bill Hearings—particularly stressed the desirability in the public interest of avoiding the expense of wasteful transportation resulting from the competitive efforts of carriers to deflect traffic from the direct routes. While recognizing that the competitive policy might seem in many cases actually vital to the interest of the individual lines, the report goes on to state:†

---

* See Appendix 5, *infra*, p. 15a.

† See Freight Traffic Report, Federal Coordinator of Transportation, Section of Transportation Service, Vol. 1 (May, 1935) pages 77-78, quoted in statement of D. R. Lincoln at Hearings on S. 1261, Appendix 5, *infra*, pp. 16a-18a. For fuller quotations from the Coordinator's Report on this subject see Hearings S. 1261, pages 143-144 (also reported in Hearings on H. R. 3400, pp. 140-141).

> *"From the wider public standpoint, it would be cheaper to give a direct subsidy to protect those interests than it is to provide the subsidy indirectly plus the waste entailed."* (Italics inserted.)

Specifically with respect to intercarrier operations the Coordinator's Report, in discussing the policy of wide open carrier routes states *inter alia* that "the policy leads to *wasteful methods of operation by increasing the number of points at which interchanges are made, by greatly increasing the number of interchanges themselves, and by discouraging through inter-carrier train operations.*"* (Italics inserted.)

Immediately following this quoted portion of the Coordinator's Report is the following statement therein with respect to interchange cost:

> "116. *Cost.* In 1932 there were over 50 million interchanges reported at an aggregate cost of 330 million dollars. *The cost per car interchange was $10.78*, and per intercarrier car originated $30.85."† (Italics inserted.)

In concluding its discussion on the subject of intercarrier operations the said Coordinator's Report states:

> "With direct routes available, grouped into definite channels, the shipper's interests will be advanced by great acceleration in overall speed which results from the movement in through intercarrier trains, and also by the *elimination of waste in operating expenses which in the end are borne by the shipper.*"‡ (Italics inserted.)

---

* Freight Traffic Report, Federal Coordinator of Transportation, Vol. 1, p. 104, quoted in statement of D. R. Lincoln at Hearings on S. 1261, Appendix 5, *infra*, p. 17a.

† See Federal Coordinator's Freight Traffic Report, Vol. 1, p. 104, quoted in statement of Harry Wilson at Hearings on S. 1261, p. 143.

‡ Coordinator's Freight Traffic Report, Vol. 1, p. 105, quoted in statement of D. R. Lincoln at Hearings on S. 1261, Appendix 5, *infra*, pp. 17a-18a.

In addition to these and similar findings from the Coordinator's Report, there were before the committees of Congress which held Hearings on S. 1261 and H. R. 3400* statements on the same subject and to the same general effect by railroad witnesses opposed to the repeal of the short-haul rule. See statements of D. R. Lincoln, Assistant to the Chief Traffic Officer, Missouri Pacific Lines, Harry Wilson, Vice Chairman, Traffic Executive Association, Eastern Territory, Paul P. Hastings, Vice President, Atchison, Topeka & Santa Fe Railway, E. W. Soergel, Assistant Freight Traffic Manager, Chicago, Milwaukee, St. Paul & Pacific Railroad, and R. J. Doss, Freight Traffic Manager, Atlantic Coast Line Railroad, at the Hearings on S. 1261, excerpts from which appear in Appendix 5, *infra*, pp. 14a-19a.

(5) *Promotion of efficiency and economy in operation.*

Throughout the statements of the railroad witnesses who appeared at the various Congressional hearings in support of the retention of the short-haul rule and in opposition to its elimination will be found repeated references to the fact that its underlying justification is that it tends *to promote efficiency and economy in operation*, and to discourage the establishment of routes which would involve the accrual of greater expense ultimately to be borne by the public for the accomplishment of the same essential ultimate transportation service. Typical of these is the statement of Mr. L. T. Wilcox, Assistant Traffic Manager of the Union Pacific Railroad, at page 107 of the printed Hearings in S. 1261, that "the more the movement of traffic can be confined to single-line hauls, the more efficient and more economical can the service be accomplished, thereby giving the *shipping public as a whole* the benefit of the *efficient operation of the railroads.*"†

*The Hearings in S. 1261 were incorporated in the Hearings on H. R. 3400.

†Also reported in Hearings on H. R. 3400, p. 104.

(Italics inserted.) Statements to the same general effect made at the Hearings on S. 1261 (which were also incorporated in the Hearings on H. R. 3400) are reproduced in Appendix 5, *infra*, pp. 19a-21a.

(6) *Unnecessary injection of short lines in through routes.*

Several of the railroad witnesses appearing before Congressional committees in opposition to bills proposing repeal of the short-haul rule stressed the lack of economic justification for the prescription of through routes so as to embrace a short line railroad merely for the purpose of according it a share of the freight revenue, where the result must inevitably be an increase in the cost of operation and a reduction of the net revenue to the railroads. On this aspect of the subject see the statements of Vice President Hastings of the Santa Fe and Mr. Harry Wilson for Eastern lines at the Hearings on S. 1261, excerpts from which are included in Appendix 5, *infra*, p. 21a.

8. The Legislative History of the Enactment of Clause (b) Shows the Commission's Interpretation, Which the Lower Court Upheld, to be Erroneous.

As hereinabove set forth the interpretation for which appellants contend is in accordance with the obvious meaning of the words used and with the definition of the term "transportation" as used in the Act. It is consistent with and gives full effect to the other provisions of paragraphs (3) and (4) of Section 15 and conforms with the national transportation policy as recognized by this Court and as specifically declared by Congress in 1940. In view of this situation reference to the legislative history of clause (b) is appropriate to confirm the obvious import of the language used.

United States v. *Missouri Pac. R. Co.*, 278 U. S. 269, 278-279 and footnotes;

Helvering v. *Griffiths*, 318 U. S. 371, 378-383 and footnotes.

a. The Hearings on the Bills that became the Transportation Act of 1940 make specific reference to the Hearings on the Through Route Bills.

Clause (b) of Section 15(4) first appeared, in the same form as finally enacted, in the Conference Committee reports* on S. 2009, which became the Transportation Act of 1940. S. 2009 as initially passed by the Senate (76th Cong. 1st Sess.) eliminated the short-hauling restriction from Sec. 15(4). In the House, S. 2009 was amended by striking out all following the enacting clause and by inserting the House version as an amendment. This amendment of S. 2009 made no change in Section 15(4), but allowed the short-hauling provision to remain in effect. While the conference reports contain a full statement of what is provided by the amendments to Section 15 (4), they do not attempt to set forth the reasons for the amendments.

If reference is made to the hearings conducted by the Senate Committee on Interstate Commerce on S. 2009†, and by the House Committee on Interstate and Foreign Commerce on the related bills,‡ which resulted in the Transportation Act of 1940, it will be found that they do not in themselves disclose the considerations that occasioned the amendment in clause (b). This was for the reason that the question of the repeal of the short-haul rule had been and then was the subject of separate hearings on certain through route bills,§ which hearings were specifically referred to in the Hearings on S. 2009 and

* See H. R. Conference Report No. 2016 (to accompany S. 2009), 76th Cong., 3rd Sess., April 26, 1940, pages 10-11, 64-65, and H. R. Conference Report No. 2832 (to accompany S. 2009) 76th Cong., 3rd Sess., August 7, 1940, pages 15-16, 70-71.

† See Hearings on S. 1310, S. 1869, S. 2009, before Senate Committee on Interstate Commerce (76th Cong., 1st Sess.).

‡ See Hearings on H. R. 2531, and H. R. 4862 (76th Cong., 1st Sess.).

§ House Hearings on S. 1261 (75th Cong., 2d and 3d Sess.); Senate Hearings on S. 1085 (76th Cong., 1st Sess.); and House Hearings on H. R. 3400 (76th Cong., 1st Sess.).

related bills and were relied upon for the exposition of that subject.

Thus, at the Senate Hearings on S. 2009 *et al*, out of which developed the Transportation Act of 1940, Witness J. M. Hood, President, American Short Line Railroad Association, asked that S. 2009 as introduced be amended to conform to *Senate Bill 1085* then pending, which proposed the repeal of the short-haul rule. As hearings on the latter had been completed and the printed Hearings thereon were available to the Committee, no further hearings on the subject were held in connection with S. 2009. This is shown by the following therefrom:*

> "The other amendment which we strongly urge has to do with section 27, on page 96 of the bill. This section undertakes to continue as the law of the land what is now paragraph 4 of section 15 of the Interstate Commerce Act, which is a limitation upon the right of the Interstate Commerce Commission to prescribe through routes and rates, and to require the continuation in the public interest of existing through routes and rates.
>
> "The change in the law which we urge is that contained in *Senate bill 1085*, which is before a subcommittee of this committee, hearings having been completed, entitled '*Through Routes, S. 1085*'; and the hearings print bears the Government Printing Office identification number 132900.
>
> "We urge that since S. 2009 is a codification of the existing Interstate Commerce Act, the bill *S. 1085* be incorporated therein by an addition to paragraph 1 of Section 27, and a *deletion in paragraph 2*† both of which are well understood by the members of the subcommittee and by most members of the committee.
>
> * * * * * * *

---

* See hearings on S. 1310, S. 2016, S. 1869, S. 2009, before Senate Committee on Interstate Commerce (76th Cong., 1st Sess.) pp. 542, 547.

† This refers to the proposed deletion of the short-haul rule.

"SENATOR REED:—However, I did not intend to hold another hearing or suggest that the full committee hold another hearing on *S. 1085.* I think it has been pretty well covered in the record made.

"MR. HOOD:—Yes, Senator. As was stated at the subcommittee hearing, there is substantially nothing that can be added to the record that was made in the previous hearing in the Seventy-Fifth Congress,* which is available to you, and this record on *S. 1085.*" (Italics inserted.)

The Senate Committee report† which accompanied S. 2009 as passed by the Senate specifically refers to S. 1085 as the basis for the proposed deletion of the short-haul rule. Thus, at page 21 thereof, in discussing Section 27 of the bill with respect to through routes and joint rates, the report states:

"The new matter inserted beginning in line 7, page 112, and *the deleted matter on the same page, embody changes carried in the through routes bill, S. 1085,* introduced by Senator Wheeler. In a number of annual reports, beginning with its forty-third, the Commission has recommended this change in the law, a change necessitated by a construction of the law by the Supreme Court."‡ (Italics inserted.)

When the corresponding bill in the House—the Omnibus Transportation Bill, H. R. 2531, 4862 (76th Cong., 1st Sess.)—came on for hearing before the House Committee on Interstate and Foreign Commerce in March, 1939, Mr. J. M. Hood, President of the American Short Line Railroad Association, in asking the repeal of the short-hauling restriction on the Commission's power to

*The reference is to the House Committee Hearings on S. 1261 (75th Cong., 1st Sess.).

†Senate Report No. 433, 76th Cong., 1st Session, to accompany S. 2009, dated May 16 (legislative day, May 8), 1939.

‡*United States* v. *Missouri Pacific R. Co.*, 278 U. S. 269.

prescribe through routes, made specific reference to the House Committee hearings on H. R. 3400 and S. 1261 as including all information needed by the committee for the disposition of this feature. Thus, he there stated:*

> "You will find in this blue pamphlet before you on page 1 that the association favors giving the Interstate Commerce Commission power to require the establishment and maintenance of through rail routes found by it to be necessary or desirable in the public interest.
>
> "That is the subject of a bill pending before this committee, *H. R. 3400,* and it was the subject of very complete hearings before a subcommittee of this committee, during the Seventy-fifth Congress. The hearings are entitled *'Senate 1261,'* so that there is no further explanation needed by me." (Italics inserted.)

b. The Hearings on the Through Route Bills clearly indicate that clause (b) relates to efficiency and economy of railroad operation.

Reference to the hearings on S. 1085 and H. R. 3400† will show that those bills to eliminate the short-hauling provision, in addition to having the recommendation of the Interstate Commerce Commission, were mainly advocated by the short line railroads with some support from shippers and shippers' organizations. Both these groups

---

* See printed Hearings, H. R. 2531, H. R. 4862; Vol. 2, p. 1353.

† When H. R. 3400 came on for hearing on April 18, 1939, before a subcommittee of the House Committee on Interstate and Foreign Commerce, the Chairman (p. 1) incorporated in the hearings thereon the printed Hearings on S. 1261 (75th Cong., 2d and 3d Sess.), an identical bill as respects Sec. 15 (4) on which House hearings had been held at the previous session, and the latter appear at pages 3-185 of the printed Hearings in H. R. 3400.

The form of the bill as passed by the Senate appears in Hearings on S. 1261 before subcommittee of House Committee on Interstate and Foreign Commerce, 75th Cong., 2d and 3d Sessions, p. 1. See also report No. 404 from the Senate Committee on Interstate Commerce, 75th Cong., 1st Sess. to accompany S. 1261, dated April 22, 1937.

were particularly interested in the maintenance of existing routes which they feared might be canceled if the short-haul rule remained in effect.* Almost the only opposition to the bills was presented by the principal trunk line railroads which urged the retention of the short-haul rule.

The general grounds of the railroad opposition to the repeal of the rule have been noted above.† Basically all of those objections depend for their persuasiveness upon the fact that they are in line with the *ultimate interest of the public in providing adequate transportation with the utmost of efficiency and economy in operation.* This is shown in the following portion of the summation made in the statement of R. S. Outlaw, who appeared in the hearings on S. 1085 for all the main trunk lines in the West, the East, and the South that were opposing repeal of the short-haul rule. At page 62 of those hearings he stated in part:

> "The proponents of these bills are asking that the Commission be given power to prescribe additional through routes where direct, adequate, and satisfactory routes already exist, in spite of the fact that the new routes *would not be more efficient* or more satisfactory routes, would not be of material advantage to the shipping public, but would generally prove *more expensive* and less desirable *to operate.*
>
> * * * * * * *
>
> "The primary objective of the bill is to enable the Commission, where its sympathies may be enlisted, to require additional through routes which are

* See statements of:

J. M. Hood, President, American Short Line Railroad Association, Hearings S. 1261, p. 10 (also reported Hearings H. R. 3400, p. 12);

Charles R. Seal, Acting Chairman, National Industrial Traffic League, Hearings S. 1261, pp. 39-40 (also reported Hearings H. R. 3400, pp. 39-40);

Joseph B. Eastman, Member of the Interstate Commerce Commission and Chairman of its Legislative Committee, Hearings S. 1085, p. 7.

† *V. supra,* pp. 45-52.

longer, *more expensive to operate,* or *made up of a greater number of railroads than existing through routes.*

"Clearly, therefore, the proposal is nothing less than a demand for *wasteful transportation* just at a time when all possible waste should be avoided." (Italics inserted.)

One further feature of the background of the 1940 amendments to Section 15(4) deserves to be noted at this point. Throughout the various hearings on the bills which proposed to repeal the short-haul rule* there was a repeated request on the part of spokesmen for the trunk line railroads of the country that the Congress should provide some more definite guide for the Commission's determination of what routes should be found by it to be necessary or desirable in the "public interest". This feature was the subject of concern on the part of the committees considering those bills. For example, in answer to questions by Congressman Huddleston, Mr. J. Carter Fort, who appeared for the Association of American Railroads in opposition to H. R. 5364 (74th Cong., 2nd Sess.), stated at pages 70-71 of the printed Hearings as follows:

"MR. HUDDLESTON:—Mr. Miller stated yesterday that this bill would permit the Commission on a finding of 'public interest' to require the originating carrier to turn freight over to a short line and that the public interest might be found to consist in the need of the short line for revenue. Do you agree with that interpretation?

"MR. FORT:—Mr. Huddleston, when you speak of the public interest, of course you have a criterion, if you call it a criterion at all, which is as broad as the guide or criterion of Congress itself. What one person or one commissioner might regard as being in the

* See reference to these bills and the Hearings thereon at page 46, *supra*.

public interest I do not think anyone in the world could tell. But it is perfectly true that in the past, and in the *Subiaco case,* 107 I. C. C., the Interstate Commerce Commission held that the public interest referred to in this particular provision of the statute, enabled the Commission to establish a route for the sole purpose of transferring revenue to one railroad and taking it away from another line without regard to the necessity to the shipping public for the new route * * *.

* * * * * * *

"MR. HUDDLESTON:—In short, is that definition of public interest applicable to 'public interest' as used in this amendment?

"MR. FORT:—The Commission has so construed it. In other words, it is just as broad as all outdoors. The Commission has no real criterion at all. It is free to bind and loose as it sees fit; to take business away from a line or establish a route which would take business away from one line and give it to another, not because the public needs the new route, not at all; not because the other route is not as direct as any route could be, but simply because it wants to give the business to some short line. It could do that under its interpretation of the statute."

At the later Hearings on S. 1261 (75th Cong., 2d and 3rd Sess.) pp. 93-94, before a subcommittee of the House Committee on Interstate and Foreign Commerce—which printed Hearings are embodied in the printed Hearings on H. R. 3400 (76th Cong., 1st Sess.) p. 92—Mr. L. T. Wilcox, Assistant Traffic Manager of the Union Pacific Railroad, in opposing the bills which would have repealed the short-hauling limitation, voiced the same conviction as to the indeterminate character of the term "public interest" in the following statement:

> "*They would remove all restrictions on the power of the Commission to fix any joint through routes which it may consider as being in the public interest without any definition by the Congress as to what is the public interest in the premises, and without laying down any rules for the guidance of the Commission in determining what joint through routes will be in the public interest.* In other words, the passage of either of these bills will result in a complete delegation to the Commission of legislative authority with respect to establishing such joint through routes as may seem to it desirable, without giving an originating carrier or an intermediate carrier any right under any circumstances to retain their long hauls. The Commission would be able to deprive an originating carrier, or an intermediate carrier after coming into possession of the traffic, of their long hauls although their routes may be *shorter* and the traffic can be handled *more efficiently* and *economically* than by competitive routes, *based on a finding that this is in the public interest although the 'public interest' is not defined* and such originating or intermediate carriers may be deprived of revenue which would be arbitrarily given to their competitors." (Emphasis supplied.)

With this background the key to the origin and significance of clause (b) will be found in the following questions asked and answers of Joseph B. Eastman, member of the Interstate Commerce Commission and Chairman of its Legislative Committee, when appearing before the subcommittee of the Senate Committee on Interstate Commerce holding hearings on S. 1085 (pp. 8-10):*

> "SENATOR JOHNSON OF COLORADO:—I take it this whole matter involves the expense of transfer and switching charges. Will you say it does not cost the

* The emphasis in the quotations from the Hearings has been supplied throughout.

shipper anything and therefore he is not interested in it because the rate is the same? Certainly it costs the railroad something, and the shipper supports the railroad and therefore indirectly it does cost him something. He is very much interested in efficient service. *He is very much interested in low cost of transportation. While a railroad can operate in red for a while, yet eventually the cost will be on the shipper. So if there is an unreasonable cost by way of transfer and switching charges, the shipper will have to bear that expense in the end, will he not?*

"COMMISSIONER EASTMAN:—*Yes.*"

"SENATOR JOHNSON OF COLORADO:—If the Commission would arbitrarily designate routing would it not necessarily involve switching charges between one railroad and another?

"COMMISSIONER EASTMAN:—If you are going to assume that the Commission will act arbitrarily under this amendment, that might follow. As the law would stand, with this amendment, the Commission could only do it in this way: establish a through route if it was proved on the record that such route was necessary or desirable in the public interest. Now, if there were going to be a lot of transfer and switching charges involved in that route, it might well be that such proof could not be supplied. From our point of view we assume we are not going to act arbitrarily but only where there is necessary proof as to public interest.

"SENATOR JOHNSON OF COLORADO:—You will be the judge of public interest.

"COMMISSIONER EASTMAN:—Yes; *and if you want to define it more definitely, of course we will be glad to have it defined.* But I will say that in studying the question of public interest we would certainly take into consideration the expense over the proposed route.

"SENATOR JOHNSON OF COLORADO:—*The expense to the railroad.*

"COMMISSIONER EASTMAN:—*Yes; the expense to the railroad.*

"SENATOR BONE:—Would two or three switching and transfer charges be sufficient in amount to justify a railroad in avoiding them by carrying a shipment we will say 1,000 miles farther?

"COMMISSIONER EASTMAN:—No; not in my opinion. I do not think we would prescribe any such route as that; I mean, if a situation should arise in connection with routes which were comparable. * * *

* * * * * * *

"SENATOR JOHNSON OF COLORADO:—How does the Commission arrive at the difference between the cost, or as to the comparative cost of transferring and switching, and the regular movement over the regular routes? In other words, how many miles of direct haul would equal the transfer charge between two railroads? *The transfer charge as I understand it is something in the neighborhood of, we will say, from $5 to $15 per car. How many miles could a railroad haul a car over their own line that would be equal to a transfer charge?*

"COMMISSIONER EASTMAN:—Well, I would not venture to say as to that.

"SENATOR JOHNSON OF COLORADO:—How, then, could you determine public interest?

"COMMISSIONER EASTMAN:—*I assume that all such information as that would be put on the record by anyone opposing a route and regarding it as unnecessary and undesirable in the public interest.* You are now asking me to answer an abstract question, without any record before me to show how much the line haul is that would be equivalent to such a transfer or switching charge. I cannot answer that question offhand.

"SENATOR JOHNSON OF COLORADO:—*You will take that into consideration in arriving at a conclusion as to public interest?*

"COMMISSIONER EASTMAN:—Yes.

"SENATOR REED:—Perhaps it might help Senator Johnson some if I made the suggestion that in comparing line-haul costs with transfer charges one were to assume, and it is purely an assumption and I do not mean to say it is accurate because it varies in different circumstances, but let us say that 4 mills per gross ton-mile is the cost of handling traffic on a railroad. With that assumption before you, you could determine the additional mileage that a shipment could be hauled to offset the 5 or 7 or 8 or 10 or whatever number of dollars might be involved in a transfer at an interchange point.

"COMMISSIONER EASTMAN:—Oh, certainly such computations can be made.

"SENATOR REED:—I am trying to get that point before Senator Johnson. He and I are both farmers, but I have been pitchforked into a little experience with this question, and I thought perhaps my question might help a little bit to clarify the situation. That is a way by which you could make a computation, I mean by making certain assumptions, and they are assumptions.

"COMMISSIONER EEASTMAN:—I do not intend to deny that at all. In event a question of that kind came up under this proposed amendment, *the railroads who might oppose the establishment of such through routes, are entirely competent to present such computations on the record.* Furthermore, if the Commission should go so far as to act arbitrarily, that would become an error of law which can be corrected by the Supreme Court. The Supreme Court can act if we act arbitrarily, without substantial evidence to support our conclusions.

* * * * * *

Then at page 13 of the same hearings appears the question of Senator Reed and the answer of Commissioner Eastman that undoubtedly explains the origin and basis of the provision contained in clause (b). These were as follows:

> "SENATOR REED:—Yes; now, Mr. Eastman, may I ask you this question, because I am trying to get at the broadest possible scope of this thing, looking at the railroad situation as a whole and not with respect to any individual line. *Would you think it would be pertinent or advisable to add a further proviso, that the Commission should not approve any route, even one published by the carriers, that was not reasonably efficient and economical?*
>
> "COMMISSIONER EASTMAN:—*I personally would not have any objection to that.*" (Italics inserted.)

In confirmation of this conclusion is the following additional statement by Senator Reed at pages 15-16:

> "SENATOR REED:—As a member of this committee, I should like to do something constructive with this, in addition to giving the Commission whatever power is reasonably desirable. I wonder whether it would be constructive if we *added a proviso* there—and I would rather trust Commissioner Eastman's language than my own; but just trying to embody the thought I had, that, in approving tariffs of carriers, the Commission *should not approve any route that was not economical or that resulted in additional costs that would be considered as wasteful* competition, or words to that effect." (Italics inserted.)

In further confirmation as to the origin and purpose of clause (b) the following appears in the printed Hearings on S. 1085 at page 21:

> "SENATOR REED:—Mr. Eastman, just following out that thought I had, and which has been expressed

in the record: Could you formulate a further provision that we could add to this proposed change in this paragraph, that *would be of any help to the Commission in determining the public interest* in these questions, and that would administratively be of any aid to you?

"COMMISSIONER EASTMAN:—*Well, it could be done. You, yourself, suggested certain language which seems to me to be apt.*

"SENATOR REED:—Well, I regard you as a master of the subject. I wonder if you would be willing, upon request of the committee—to beg the pardon of the chairman—I am just trying to see if we could get a suggestion from Mr. Eastman along the lines that we are discussing, that might be helpful in the public interest; that is all.

"COMMISSIONER EASTMAN:—*Well, any amendment of this bill would simply have the effect of defining the public interest with respect to the ordering of through routes by the Commission.*

"SENATOR REED:—That is right." (Italics inserted.)

The correctness of this conclusion as to the origin and purpose of clause (b) gains support from the fact that Senator Reed was one of the representatives of the Senate on the Conference Committee on S. 2009 which framed the amendments of the through route provision including clause (b) of Section 15 (4).*

In the light of the foregoing it must be apparent that the Conference Committee in proposing, and the Congress in enacting, clause (b), as well as the new provision in the same paragraph against prescribing routes for the

*See Conference Report No. 2016 dated April 26, 1940, to accompany S. 2009 as presented by Mr. Lea, to the House of Representatives (76th Cong., 3d Sess.), p. 57, and Conference Report No. 2832, dated August 7, 1940, to accompany S. 2009, presented by Mr. Lea to the House of Representatives (76th Cong., 3d Sess.), p. 62.

purpose of diverting revenue, were undertaking to provide more certain guides for the Commission's determination of what was "necessary or desirable in the public interest" and were furthering the national transportation policy which looks to the prevention of waste and to the securing of efficient and economic operation as a sound basis for the provision of adequate transportation for the public at the lowest rates consistent therewith.

With reference to the significant colloquy between Senator Reed and Commissioner Eastman above quoted one might paraphrase the statement of this Court, speaking through Mr. Justice Jackson in *Helvering* v. *Griffiths*, 318 U. S. 371, 378, as follows:

> "The statements of members of Congress and of a responsible Commission official at the hearings are at variance with the present assertion of the Government that Congress intended clause (b) virtually to repeal the short-haul provision."*

Since the natural purport of clause (b) obtains significant confirmation when reference is made to its legislative history, and since the occasion for the amendment cannot otherwise be reasonably explained, the conclusions of the Second Circuit Court of Appeals speaking through Circuit Judge Learned Hand in *Securities & Exchange Com'n* v. *Robert Collier & Co.*, 76 F. (2d) 939, 941, become particularly apposite:

---

* The original statement of this Court reads:

"The statements of members of Congress and of responsible Treasury officials at the hearings and debates on the Act are at variance with the present assertion of the Government that Congress intended Section 1[5] (f) (1) to challenge or override the decision to which it had in other sections of the Act accommodated itself."

It should be noted that the decision cited does not limit the Court to referring to statements of official witnesses before Congressional committees. Thus, there is extended reference in the foonote beginning at pages 377 and 390 of that decision to statements of a Witness Alvord who represented the Chamber of Commerce of the United States, an entirely unofficial organization.

"Finally, it is said that we should not regard the testimony of a witness before the committees; that it is not even as relevant as speeches on the floor of either house, which courts will not consider at all [Citing cases]. It would indeed be absurd to suppose that the testimony of a witness by itself could be used to interpret an act of Congress; we are not so using it. The bill was changed in a most significant way; we are concerned to learn why this was done; we find that it can most readily be explained, and indeed cannot naturally be explained on any other assumption than by supposing that the committees assented to a request from the very agency to whom the new functions were to be committed. To close our eyes to this patent and compelling argument would be the last measure of arid formalism. The amendments of a bill in committee are fertile sources of interpretation. Pennsylvania R. Co. *v.* International Coal Co., 230 U. S. 184, 198, 199, 33 S. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315. It is of course true that members who vote upon a bill do not all know, probably very few of them know, what has taken place in committee. On the most rigid theory, possibly we ought to assume that they accept the words just as the words read, without any background of amendment or other evidence as to their meaning. But courts have come to treat the facts more really; they recognize that while members deliberately express their personal position upon the general purposes of the legislation, as to the details of its articulation they accept the work of the committees; so much they delegate because legislation could not go on in any other way."

The legislative history of the enactment of clause (b) furnishes cogent evidence that Congress did not empower the Commission to find in the public interest or to prescribe new through routes which would short-haul a non-

consenting railroad unless the Commission finds that the existing routes from point of origin to ultimate destination do not furnish adequate transportation between such points and that the proposed routes can be operated more efficiently or more economically than the existing routes.

For all the reasons above indicated, petitioners submit that the Commission's order rests upon a mistake of law with respect to its authority to prescribe through routes and that as a consequence the order is beyond the Commission's lawful power.

9. The Comparisons Contemplated By Clause (b) Are With The Existing Direct Routes, and the District Court Erred in Failing So To Hold.

The short-hauling limitation, of which the exception in clause (b) is a part, relates to through routes between the points of origin and destination of the joint rates that are applicable thereover. This is implicit in the authority given the Commission by Sec. 15(3) to establish through routes and joint rates. The language of Sec. 15(4) is specific in providing that the Commission shall not "require any carrier by railroad, without its consent, to embrace in any such route substantially less than the entire length of its railroad * * *, which lies *between the termini* of such proposed through route, * * *." (Italics inserted.) The same conclusion is supported by the Commission's practice thereunder. Thus, in the instant case through routes are prescribed from points of origin in Central territory and from certain market points therein to certain eastern destinations from and to which points joint rates now obtain. Accordingly, the short haul limitation deals with routes between such points of origin and destination without regard to the interest of railroads or transit operators in the intermediate territory which might seek the establishment of new through routes to include their lines or to pass through particular intermediate points.

This conclusion finds direct support in the decision in *United States* v. *Missouri Pac. R. Co.*, 278 U. S. 269 (1929), which held as beyond the statutory power of the Commission an order requiring the inclusion in a new through route of an intermediate railroad which served neither the origin or destination of the rates which applied over the existing through routes.

The same point was expressly held by the Commission in its report on further hearing in *Stickell & Sons* v. *Western M. Ry. Co.*, 153 I. C. C. 759, 761, called the first *Stickell case*, where it stated:

> "In this connection complainant seems to be of the opinion that the question is whether the proposed through routes would short haul the objecting defendants in comparison with other routes which exist or could be constructed *through Hagerstown*. This, however, is clearly not the question, for there is no express requirement of law that routes must pass through particular intermediate points, and neither the short-hauling limitation nor any other provision can be read as implying any such requirement."

Appellants made the foregoing contention before the District Court. That Court disallowed the contention in the following holding (R. 97-98):

> "This argument, we believe, is without merit. It is based upon the false premise that the short-hauling limitation in Section 15 (4) of the Act cannot be subject to *any* exception by virtue of clause (b) as long as there is *any* through route between the given termini which is satisfactory to other shippers; in other words, that there is no authority for ordering a through route to pass through any particular intermediate point. While, of course, it is true, there is no express requirement of law that routes *must* pass through particular intermediate points, and neither

the short-hauling provisions nor any other provision of the Act can be read as implying such requirement (United States *v.* Missouri Pacific R. R. Co., and Stickell & Sons *v.* Western Maryland Railway Co., *supra*), it is illogical to say that where a carrier, as is true in the present case, is already serving a shipper by one through route, such shipper may not be heard on the question, and have the Commission determine whether he is entitled to a different and more advantageous through route. Thus, when the Commission found (255 I. C. C. 340) 'that the Pennsylvania maintains sufficiently frequent service to meet all reasonable demands and that it can and does furnish adequate facilities to handle any and all grain traffic likely to be given to it at western origins for movement over its direct routes or over its routes via Hagerstown to eastern destinations,' this is not to be taken as a finding which precluded the Commission from determining whether Stickell is getting, by reason of such routes, all the through route service that it is entitled to. In short, as we interpret the law, Stickell has the right to have its individual case considered from the point of view whether it is entitled to a route that is not *only* adequate, but *also* affords it 'more efficient' —that is better—or 'more economic'—that is, cheaper —transportation service."

It must be apparent from the language of the District Court that its rejection of appellants' contention on this point was the result of its erroneous conclusion that clause (b) was operative where the proposed routes would advantage the individual shipper or transit operator *without regard to whether such routes would be less efficient or less economic of operation from the railroad standpoint.*

Undoubtedly the prime purpose underlying the Commission's authorization to prescribe through routes is to facilitate through movement, *i. e.*, a continuous movement from origin to destination. As noted above* it is illogical

* *V. supra*, p. 31.

to assume that the Congress intended to clothe the Commission with authority to prescribe new through routes for the *sole purpose of effecting a rate reduction as applied to two separate movements in and out of a transit point.*

But aside from this consideration, of necessity the standard of comparison would have to be the existing direct routes rather than such indirect routes as might be in effect. This is so because otherwise the purpose of requiring the comparison of the efficiency or the economy of the routes would fail of its purpose. If an indirect route were used as the standard, perchance a still more indirect route might be prescribed and so on *ad infinitum* to the complete disregard of the national transportation policy of fostering efficiency and economy of operation.

The error implicit in the failure of the Commission and of the Court below to regard the existing direct routes as the standard by which to compare those proposed more clearly appears if it be assumed that the Pennsylvania maintained no routes over its lines to and from Hagerstown subject to back-haul charge. Prior to May 5, 1921, there was no transit arrangement available to the Hagerstown manufacturer on traffic received and shipped over the Pennsylvania. On that date there was established, at complainant's request, the arrangement whereby it could receive and forward its shipments over the Pennsylvania on the basis of the rate over the direct routes plus a back-haul charge. I. C. C. Ex. 45 (R. 409, 410, 271-273, 338). If therefore the instant complaint had arisen before the establishment of the Pennsylvania route via Hagerstown, the only possible comparison of the proposed through routes would have been with the direct routes of the Pennsylvania to destination. This being so, it would be illogical to assume that the voluntary action of the Pennsylvania in establishing a through route via Hagerstown subject to back-haul charge should operate to establish a new and more lax standard against which to

compare the efficiency or the economy of the proposed routes. Indeed, the very fact that the Pennsylvania's routes via Hagerstown are subject to a back-haul charge would seem to make necessary that any comparison of the proposed routes, over which the same rate would be fixed as over the direct routes, should be only with the latter.

II. THE DISTRICT COURT ERRED IN FAILING TO HOLD THAT THE COMMISSION'S ORDER IS NOT SUPPORTED BY ESSENTIAL AND BASIC FINDINGS AND IN HOLDING THE CONTRARY.*

A. The Commission's Ultimate Finding In the Language of the Statute Will Not Sustain Its Order Where There is a Lack of Basic Or Essential Findings.

The Commission made its ultimate finding substantially in the terms of the statute. Thus:

> "We find that the two routes sought are necessary and desirable in the public interest and that they are needed to provide adequate and more efficient and adequate and more economical transportation and should be established, * * *" (R. 41).

Nevertheless, the making of such finding will not sustain its order if there is a lack of basic or essential findings. Thus, in *State of Florida* v. *United States*, 282 U. S. 194, 215, this Court stated:

> "[13] The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, to the importance of which this court has recently adverted (Beaumont, Sour Lake & Western Railway Co. *v.* United States, decided November 24, 1930, 282 U. S. 74, 51 S. Ct. 1, 75 L. Ed. 221), but

* This Point is supported by Assignments of Error Nos. 6, 12, 13, 16, 17, 19, 25, 30, 32 and 33.

of the lack of the basic or essential findings required to support the Commission's order."

See also Justice Brandeis' concurring opinion in *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 74, where, in reviewing the types of cases wherein an administrative order may be set aside, he states:

"It may set aside an order for lack of findings necessary to support it, Florida *v.* United States, 282 U. S. 194, 212-215, * * *."

In *Ann Arbor R. Co.* v. *United States,* 281 U. S. 658, 666, this Court reversed a decree dismissing a bill to set aside a Commission order wherein the Commission had found the rates involved "unreasonable", using the terms of the statute, although clearly predicating its determination of unreasonableness upon a misinterpretation of the Hoch-Smith Resolution, 49 U. S. C. Sec. 55, 43 Stat. 801. In the course of its opinion this Court stated:

"True, in both the original and supplemental opinions it is said that the existing rates are unreasonable, but the opinions taken as a whole show that this means the rates were deemed unreasonable under the joint resolution when construed as the Commission construed it, and not that they were deemed unreasonable under §1 (5) or §3 (1) of the Interstate Commerce Act. Throughout the opinions it is manifest that the Commission was testing the reasonableness and validity of the rates by considerations not applicable under those sections, but believed by it to have been brought into the problem by the resolution."

See also *United States* v. *Carolina Freight Carriers Corp.,* 315 U. S. 475, 488.

The dissenting opinion of Mr. Justice Frankfurter in *City of Yonkers* v. *United States*, U. S. , 64 S. Ct. 327, 332, contains some further elaboration of the nature of this point. Thus, he there states:

> "But courts have also spoken of the need of findings as the basis of validity of an order by the Interstate Commerce Commission in the absence of a Congressional direction for findings. The requirement of findings in such a context is merely part of the need for courts to know what it is that the Commission has really determined in order that they may know what to review. 'We must know what a decision means before the duty becomes ours to say whether it is right or wrong.' See *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 509-511.
>
> "This is the real ground for the decisions which have found Interstate Commerce Commission orders wanting in necessary findings. They have all been cases where the determination of an issue is not open to independent judgment by this Court, and where the case as it came here rested on conflicting inferences of fact left unresolved by the Commission. Such were the circumstances, for instance, in *Florida* v. *United States*, 282 U. S. 194, particularly at 214-215, and *United States* v. *B. & O. R. Co.*, 293 U. S. 454, 455, particularly at 463-464. Findings in this sense is a way of describing the duty of the Commission to decide issues actually in controversy before it."

B. The Commission's Ultimate Finding That the New Routes Are Needed to Provide Adequate Transportation Is Not Supported By Basic or Essential Findings, But Is Directly Contrary To Its Finding That the Present Routes Furnish Adequate Transportation, and the District Court Erred In Failing So to Hold.

The Commission's ultimate finding includes the finding that "the two routes sought * * * are needed to

provide adequate * * * transportation * * *." Yet its report contains basic findings to the contrary effect that the present routes furnish adequate transportation. Thus, the Commission, with respect to the contention of the Pennsylvania that its routes are adequate, efficient, and economical, made the following specific findings (R. 36):

> "It maintains scheduled fast trains that operate frequently over direct routes, that do not go through Hagerstown, from the rate-break points and origins on its line and from its junctions with other carriers in central territory to the destinations here considered. Its main routes from the west are via Pittsburgh and its Enola yard, which is across the Susquehanna River from Harrisburg. Traffic moving north, south, and east from Harrisburg is classified at that yard. An average of 65 scheduled trains and in addition thereto extra sections of those train, extra trains, and local trains move into and out of that yard each day. Grain handled by the Pennsylvania moving to and from Hagerstown moves through that yard. Three scheduled trains operate each way daily between Enola yard and Hagerstown, and additional sections and extra trains are used when needed. *There seems to be no question but that the Pennsylvania maintains sufficiently frequent service to meet all reasonable demands and that it can and does furnish adequate facilities to handle any and all grain traffic likely to be given to it at western origins for movement over its direct routes or over its routes via Hagerstown to eastern destinations.*" (Italics inserted.)

If, as contended by these appellants, the foregoing is a finding that the existing routes provide adequate transportation within the meaning of clause (b), then it neces-

sarily follows that the Commission's order is invalid for lack of findings necessary to invoke this exception to the prohibition of short-hauling.

The District Court rejected this same contention, but its opinion indicates that its conclusion in this respect was not predicated upon the view that the Commission's statements did not constitute findings by it, but was based upon its construction of the legal effect of clause (b) (R. 98). Thus, in referring to the portion of the finding italicized above it stated that

> "this is not to be taken as a finding which precluded the Commission from determining whether Stickell is getting, by reason of such routes, all the through route service that it is entitled to. In short, as we interpret the law, Stickell has the right to have its individual case considered from the point of view whether it is entitled to a route that is not *only* adequate, but *also* affords it 'more efficient',—that is, better,—or 'more economic'—that is cheaper,—transportation service."

It is therefore apparent that the District Court, in rejecting the railroads' contention on this score acted solely upon its conclusion that clause (b) was operative if the new route would prove more advantageous to the shipper than existing routes regardless of whether it were less efficient or less economic of operation.

But if it be contended that the foregoing quotation from the Commission's report is not a basic or essential finding that existing routes provide adequate transportation, then by comparison it must be concluded that the Commission has made no basic or essential findings whatsoever to support its ultimate finding, since there is nothing in the form or content of the statements contained in the foregoing quotation from the Commission's report which make them in any way inferior as findings to those which the Court below regarded as such. See for example

the Commission's statement (R. 36) concerning complainant's contention that "the routes sought would be more adequate, efficient, and economic from the shippers' standpoint," in which it states that "on information received from the Western Maryland, complainant estimates that it would save 2 days in reaching destinations in the Del-Mar-Va peninsula if the routes sought were established." It will be noted that the Court below (R. 95), in summarizing the Commission's findings includes among them "Stickell's estimate that there would be saved 2 days in reaching these destination points over the new through routes, * * *" (R. 95).

C. The Commission's Ultimate Finding That the New Routes Are Needed to Provide More Efficient Transportation Is Not Supported By the Necessary Basic Or Essential Findings.

While in actuality the Commission's order rests upon its conclusion that clause (b) makes the short-haul rule inoperative if the new routes would prove advantageous to the Hagerstown manufacturer, its report in terms seems to hold that the relative efficiency and economy of the present and proposed routes from a railroad operating standpoint are also to be taken into account. Thus, the Commission stated (R. 40):

> "We interpret that exception to mean adequate and more efficient and more economic from the public's or shippers' *as well as the participating carriers' standpoint.*" (Italics inserted.)

That the Court below also concluded that clause (b) comprehended considerations of railroad operating efficiency and economy is indicated by the following from the summary of its views on this point (R. 94):

> "* * * we are of the opinion that the exception embodied in that clause must be interpreted to mean

'adequate, and more efficient or more economic, transportation' from the shipper's as well as from the carrier's standpoint, and that, therefore, the Commission has authority under this clause, to consider and weigh the relative importance of all factors affecting both shipper and the carrier."

In the light of the expressed conclusions of the Commission and of the lower Court, it would seem that there should have been findings made by the Commission concerning the relative efficiency and economy of the proposed and present routes. An examination, however, will disclose an entire absence of such findings. For the purpose of this analysis the subject of relative efficiency will first be considered, and, under the next division of this point,* the subject of relative economy of operation.

1. THE COMMISSION'S REPORT CONTAINS NO BASIC FINDINGS AS TO THE RELATIVE EFFICIENCY OF THE PRESCRIBED AND PRESENT DIRECT ROUTES.

The Commission's report will be searched in vain for any basic findings that the prescribed routes are more efficient of operation than the existing direct routes of the Pennsylvania from points of origin to the destinations on its lines. That the Commission did not even undertake to make any such finding is shown by its statement (R. 36) that:

> "Complainant does not question the adequacy, efficiency, or economy of the Pennsylvania service over its direct routes but only over its route via Hagerstown."

2. THE COMMISSION'S REPORT CONTAINS NO FINDINGS THAT THE PRESCRIBED ROUTES WOULD BE MORE EFFICIENT OF OPERATION THAN THE EXISTING ROUTES OF THE PENNSYLVANIA VIA HAGERSTOWN.

Assuming *arguendo* that the Pennsylvania's routes via Hagerstown, rather than its direct routes, furnish the

* *V. infra*, p. 86.

standard for measuring the relative efficiency of the proposed routes, the conclusion is still inescapable that the Commission's report contains no such essential findings as are necessary to validate its order.

a. The Commission's reference to existing routes via the Western Maryland through Hagerstown to other eastern destinations are irrelevant.

The nearest approach to findings relating to the relative efficiency of the proposed routes is contained in the following quotation from the Commission's report (R. 36):

> "Complainant does not question the adequacy, efficiency, or economy of the Pennsylvania service over its direct routes but only over its route via Hagerstown. As to the latter, it contends the routes sought would be more adequate, efficient, and economic from the shippers' standpoint. Based on the fact that the out-of-line and interchange service at Hagerstown would be eliminated, on the fact that a car leaving Hagerstown via the Western Maryland late in the morning arrives at Elsmere Junction (Wilmington) on the Reading the next morning, and on information received from the Western Maryland, complainant *estimates* that it would save 2 days in reaching destinations in the Del-Mar-Va peninsula if the routes sought were established. Its experience shows that it takes 1 day each way between Harrisburg and Hagerstown and 1 day for each interchange between the Western Maryland and Pennsylvania at Hagerstown, making a total of 4 days required for the out-of-line service, and that it takes an average of 3 to 4 days for the movement of a car from its plant to destinations on the Del-Mar-Va peninsula." (Italics inserted.)

Under the following point there will be developed the absence of substantial evidence to support even the fore-

going indeterminate statements of the Commission,* but for the instant purpose it will suffice to show that, taken at their face value, neither such findings nor others in the Commission's report on the subject of relative efficiency, will sustain its ultimate conclusion and order.

A comparison of the through routes contemplated by clause (b) is undoubtedly of the routes in their entire length from and to the points of origin and destination of the joint rates. This is evident from the language of Sec. 15 (4) which is specific in providing that the Commission shall not "require any railroad, without its consent, to embrace in any such route substantially less than the entire length of its railroad * * *, which lies *between the termini* of such proposed through route, * * *." (Italics inserted.) The same point was expressly held by the Commission in its report on further hearing in the first *Stickell case*, 153 I. C. C. 759, 761, where it stated:

> "In this connection complainant seems to be of the opinion that the question is whether the proposed routes would short haul the objecting defendants in comparison with other routes which exist or could be constructed *through Hagerstown*. This, however, is clearly not the question, for there is no express requirement of law that routes must pass through particular intermediate points, and neither the short-hauling limitation nor any other provision can be read as implying any such requirement."

Nevertheless, there is no finding by the Commission of the relative efficiency of the proposed and present routes via Hagerstown in their entirety. This is virtually conceded by the Court below in the following statement (R. 98):

> "We may assume the correctness of the carriers' evidence that via the prescribed new routes the total

* *V. infra*, p. 89, *et seq.*

elapsed time for shipments to move from origin to destination points would, generally speaking, be longer than over the existing route. But this is not controlling, because what Stickell is most concerned with is prompt delivery of its *products*. As to them, there is no *through* movement except in the fictional sense. Of course, Stickell must count upon receiving its grain and grain products with reasonable promptness, so as to have on hand sufficient materials out of which to manufacture its products. But, practically speaking, the time taken for a carload of grain to reach the plant, would not control the time when a carload of the finished product would leave the plant. It is the movement from plant to customer that is really at issue."

Despite the conclusion of the Court below that it would be sufficient to compare the efficiency of the proposed and present routes only *from* Hagerstown, it must be obvious that this would not meet the requirements of clause (b). If a comparison of only the latter portions of the routes were considered, it might prove unrepresentative of a comparison of the routes as a whole.

The report of the Commission (R. 29-30) makes reference to the existence of numerous through routes from the origin territory involved via the Western Maryland through Hagerstown to destinations on the lines of numerous eastern railroads, not including the Baltimore & Ohio and the Pennsylvania railroads. With reference to these routes the Commission's report states (R. 39):

"As has already been shown, well established freight routes, including those here sought up to Hagerstown, are maintained at the joint through rates via Hagerstown to destinations on the Western Maryland and many of its connections east of Hagerstown. There is nothing to indicate and it is not even specifi-

> cally contended that the established joint through rates would not be reasonable over the sought routes to destinations on the Pennsylvania to the same extent that they are over the routes over which they apply to other destinations in eastern territory."

But even if regarded as a finding, this cannot serve to support the ultimate finding and order of the Commission for several reasons.

The through routes which now apply via the Western Maryland through Hagerstown to destinations on the lines of other eastern railroads (not including the Baltimore & Ohio or the Pennsylvania) operate, not through York or Fulton Junction, but through Shippensburg, Pa. As indicated on map Exhibit 66 (R. 465, 339, 358) Shippensburg is intermediate between Hagerstown and Harrisburg on the line of the Pennsylvania, and is also served by a paralleling line of the Reading Company which extends from Harrisburg. None of the routes in connection with the Western Maryland to these destinations operate through York or Fulton Junction.

It must therefore be apparent that findings with respect to the existing routes via the Western Maryland to such other destinations via Shippensburg, have no relevance to a comparison of the present routes with the prescribed routes to destinations on the Pennsylvania which would be operative via York or Fulton Junction. To employ the expression of Justice Brandeis in his summary of classes of cases wherein the order of an administrative tribunal may be set aside* it would here appear that "facts and circumstances were considered which could not legally influence the conclusion, * * *." But further than this, it is submitted that the concluding statement of the Commission, last above quoted, which relates to an absence of proof to the contrary, cannot serve affirma-

* Concurring opinion of Justice Brandeis in *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 74-75.

tively to support its ultimate finding and order. Clause (b) does not become operative upon an absence of proof that the new routes would not be more efficient or more economic than existing routes, but only upon affirmative findings by the Commission, based on substantial evidence, that they will be more efficient or more economic.

b. The reference in the Commission's report to rail-truck routes are irrelevant to the question of the relative efficiency of the present and prescribed routes.

The penultimate paragraph of the Commission's report contains the following on the subject of relative efficiency (R. 40):

> "That the present route is not as adequate and efficient as the routes sought, so far as the shipper is concerned, is evidenced by the fact that, in order to meet the demands of customers for prompt delivery, complainant shipped 640 cars from Hagerstown over the Western Maryland and the Reading to Elsmere Junction thence by truck to points on the Del-Mar-Va peninsula."

Aside from the fact that on its face it does not constitute or support a finding of the relative operating efficiency of the present and prescribed routes, but relates only to the desirability of the routes from the standpoint of the Hagerstown manufacturer, it must be obvious that the efficiency of the rail-truck route mentioned, even if it were known, would be irrelevant to the comparison of present and prescribed routes contemplated by clause (b). The rail portion of the rail-truck route passes over the line of the Western Maryland to Shippensburg, and over the line of the Reading Company beyond through Reading and Coatesville, Pa., to Elsmere Junction, near Wilmington, Del. This is a distinctly different route beyond Hagerstown from the routes prescribed via York and

Fulton Junction. Therefore whatever the efficiency of the rail-truck route might be, any finding with respect thereto would be wholly insufficient to satisfy the requirements of clause (b).

That the lower Court recognized the force of this argument is shown by its statement (R. 100):

> "We believe it to be true, as the carriers contend, that, for the purposes of the precise issue now before us, little importance should be attached to the Commission's finding that in order to meet the demands of customers for prompt delivery, Stickell shipped 640 cars of its products from Hagerstown over the Western Maryland and the Reading to Elsmere Junction (Delaware), thence by truck to destination points, because the comparison contemplated by clause (b) of Section 15 (4) must be as between the proposed routes and existing routes by *railroad*, and a comparison of a combination rail-motortruck service with all-rail service over either routes, is not contemplated."

3. THE COMMISSION'S GRATUITOUS FINDING UNDER SECTION 3 (4) WILL NOT SUPPLY THE LACK OF ESSENTIAL FINDINGS THAT THE PROPOSED ROUTES CAN BE OPERATED MORE EFFICIENTLY THAN THE EXISTING ONES.

To show the operating difficulties attendant upon the use of York and Fulton Junction as points of interchange between the Western Maryland and the Pennsylvania on the traffic involved, the defendants adduced detailed evidence of the precise character of the operations.* The Commission disregarded it as indicating a breach of duty by the Pennsylvania under Section 3 (4) of the Act to provide reasonable facilities for interchange of traffic, although no issue was presented or tried or notice of

* (R. 338-351, Exs. 66-67, R. 465, 466, 358.)

hearing given with respect to such an issue. This violated the most elementary rules with respect to the requirements of a fair hearing in making such finding.* But it is here important to note that even had there been ground for the Commission's making a finding under Section 3 (4) of the Interstate Commerce Act—to the effect that any difficulty of operation attendant upon interchange at York or Fulton Junction would indicate a failure "to afford all reasonable proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines"—such finding would not relieve the Commission from the necessity of making a finding as to the relative efficiency of the present and proposed routes in order to make operative the clause (b) exception to the short-haul rule. This is for the reason that clause (b) necessarily contemplates a comparison of existing and proposed routes *in their present state.* This must be so because, if existing interchange facilities could be made efficient only by whatever construction might be necessary to improve them, the outlay thereof would automatically become a factor in the relative economy of the existing and proposed routes. For example, the Commission regarded the evidence of difficult operating conditions incident to the interchange between the Western Maryland and the Pennsylvania at Baltimore as a showing that the Pennsylvania "has failed to perform its duty" to establish reasonable, proper, and equal facilities for the interchange of traffic with the Western Maryland (R. 37). As disclosed by the evidence, a very substantial, if not the most important, part of the operating difficulties which retard the transfer of freight from Western Maryland road trains to Pennsylvania road trains in the Baltimore area via Fulton Junction arise from the interference produced by fast passenger trains and through freight trains operating between Washington and points beyond Baltimore through the two Baltimore tunnels and the Baltimore Union Station area (R. 340-

*Standard Oil Co. v. Missouri, 224 U. S. 270, 281.

343, Ex. 67, R. 466, 358). If, therefore, it were the duty of the Pennsylvania to make whatsoever adjustment is necessary in its through train service, or in its physical facilities in the Baltimore area, such as by increasing the number of tunnels and supporting trackage, so that traffic received in interchange from the Western Maryland at Fulton Junction could more quickly be incorporated into road trains in the Bay View Yard north of Baltimore, the capital outlay to achieve that result would doubtless have an important bearing on the relative economy of that route as compared with the existing route of the Pennsylvania through Enola Yard.

D. The Commission's Ultimate Finding That The Prescribed Routes Are Needed To Provide More Economic Transportation Is Not Supported By the Necessary Basic or Essential Findings.

For the reasons above discussed with respect to relative efficiency* it is essential to the validity of the Commission's order that it be supported by findings that the routes prescribed can be operated more economically than the existing routes. No such finding has been made.

In passing it should be noted that there is nothing in clause (b) to suggest that it casts any burden upon the defendant railroads to establish a negative, failing which the clause would become operative. On the contrary, the burden to show the greater economy of the proposed routes necessarily rests upon him who invokes clause (b). This would not place any unusual burden upon a shipper since it would have access to the reports of the carriers to the Commission and could make computations of the same general sort as were introduced by the defendant railroads before the Commission (Ex. 68, 69, R. 467-474, 358). See in this connection the statement of Commissioner Eastman at page 10 of the printed Hearings in

* *V. supra*, p. 77, *et seq.*

H. R. 3400, quoted above,* with respect to the presentation of such computations on the question of relative economy of operation.

The Commission's report contains the following finding with respect to the relative distances over present and proposed routes (R. 34):

> "Both parties use Chicago as a representative origin and Salisbury, Md., as a representative destination, and the places will be so used here. The distance over the short tariff route of the Pennsylvania between those points is 902 miles. * * * The distance over route 1 via Fulton Junction is 946 miles and via York 958 miles, and over route 2 via Fulton Junction 938 miles and via York 950 miles."

But even if comparison be made with the Pennsylvania's route via Hagerstown, which would add 149 miles to produce a total of 1,051 miles, there will be found nothing in the report by which to appraise or determine the relative effect, from the standpoint of economical operation, of the somewhat greater distance over the single-line route of the Pennsylvania as against the addition of the expense of the numerous interchange services which the prescribed routes involve. Thus, as appears from the Commission's report (R. 31), the prescribed routes respectively involve the services of four and five railroads as compared with the single-line haul of the Pennsylvania.

As will appear from the discussion under another point,† the reasons given in the Commission's report for its disregard of the relative cost figures introduced by the defendant railroads as a basis for comparing the relative economy of the present and proposed routes are not sustained by the evidence, but it will here suffice to note that the Commission's disregard of this evidence (R. 38-39) will not serve as a basic or essential finding of the affirmative character necessary to sustain its ultimate finding and order.

---

* *V. supra*, pp. 62, 63.
† *V. infra*, p. 103, *et seq.*

III. THE DISTRICT COURT ERRED IN FAILING TO HOLD THAT THE COMMISSION'S ORDER IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, BUT IS AGAINST THE EVIDENCE, AND IN HOLDING THE CONTRARY.*

As will be developed under the appropriate subdivisions of this point, the Commission's ultimate finding that the prescribed routes "are necessary and desirable in the public interest and * * * are needed to provide adequate and more efficient and adequate and more economical transportation" is not only without support in the record but is contrary thereto, and its order based thereon is therefore invalid.

Southern Pacific Co. v. *Interstate Commerce Commission*, 219 U. S. 433, 449;
Interstate Commerce Commission v. *Union Pacific R. R.*, 222 U. S. 541, 547;
The Chicago Junction Case, 264 U. S. 258, 264-266;
Northern Pac. Ry. Co. v. *Department of Public Works*, 268 U. S. 39, 44-45;
State of Florida v. *United States*, 282 U. S. 194, 213;
United States v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 506.

A. The Commission's Ultimate Finding That the New Routes Are Needed To Provide Adequate Transportation Is Without Support In the Record Which Shows That Adequate Transportation Is Now Available.

As developed above, the concept of adequate transportation as that expression is used in clause (b) relates to adequacy of the physical transportation service as distinguished from the measure of the rates charged therefor. Furthermore, clause (b) contemplates no comparison

* This Point is supported by Assignments of Error Nos. 2, 3, 5-7, 14, 20-24, 35-40.

of adequacy. The question is not whether the present route is *as* adequate as the routes sought—as supposed by the Commission (R. 40)—but whether the existing routes provide adequate transportation.

The adequacy of the physical transportation service available over the existing routes of the Pennsylvania—both direct and via Hagerstown—is well established by the record and is also reflected in the specific finding of the Commission quoted above.*

In view of this specific finding the exception contained in clause (b) to the short-haul rule cannot be invoked because, whatever the findings as to relative efficiency or economy of the present and proposed routes, it is a pre-requisite to the application of clause (b) that the Commission make a valid finding that the proposed routes are needed in order to provide adequate transportation. But such a finding cannot be made where the existing routes already provide adequate transportation. In this connection it should be noted that the word "adequate" as used in clause (b) is not employed in a relative or comparative sense. In this situation clause (b) is not operative to make the short-haul rule inapplicable, and the Commission was without power in the circumstances to make the order which is here assailed.

B. The Commission's Ultimate Finding As To the Greater Efficiency of the New Routes Is Not Supported By, But Is Against, the Evidence, and the District Court Erred In Holding the Contrary.

1. Complainant presented no evidence to the Commission as to the relative efficiency of operation of the present and proposed routes in their entirety.

The expression "more efficient transportation" as used in clause (b) naturally suggests the idea of a more

*V. *supra*, p. 75.

effective transportation service in the sense of accomplishing it more quickly and also the idea of expending less time and energy in its accomplishment. It will therefore be in order to examine the evidence which in this respect bears upon a comparison of the proposed routes with the existing routes of the Pennsylvania.

In the evidence presented by complainant to the Commission there was no attempt to compare the relative efficiency or economy of the present and proposed routes as through routes from origin to destination. The lack of findings on this subject has already been noted.* While the Commission's report (R. 32) includes the statement that

> "The routes sought up to Hagerstown are well established and generally accepted as reasonable by shippers and the carriers parties thereto to points in eastern territory."

even this statement is not based upon anything here of record, but appears to have been lifted from the decision of Division 4 in the first *Stickell case*.† Aside from the fact that it may not here be used as evidence (*United States* v. *Abilene & S. Ry. Co.*, 265 U. S. 274), there is no record basis by which the relative efficiency or economy of such routes up to Hagerstown plus the prescribed routes beyond could be compared with the existing routes in their entirety from origin to destination.

As concerns the absence of any basis for a comparison of the efficiency of the proposed and existing *direct* routes, this appears to have been admitted in the Reply Brief for the United States in the Court below in the following statement:

> "Clearly it would be impossible for the Commission, on the complaint of a Hagerstown shipper, to deter-

* *V. supra*, p. 74, *et seq.*

† *Stickell & Sons* v. *W. M. Ry. Co.*, 146 I. C. C. 609, 615.

mine under exemption (b) whether a proposed route through Hagerstown would be 'more efficient or more economic,' either from the standpoint of service to the shipper or from the standpoint of railroad operation, if it did not compare conditions over such route with conditions over routes actually available to the Hagerstown shipper, and the only service available to the Hagerstown shipper is by way of Hagerstown."

Parenthetically it may be noted that this argument of the United States begs the essential question, which is as to whether the comparisons contemplated by clause (b) is with the direct or indirect routes between the termini. Stated differently, it begs the question whether clause (b) is in harmony with, or an exception from, the national transportation policy of Congress to protect the interests of the shipping public generally as against an adverse interest of an individual shipper or transit operator. But for the purpose of the immediate argument it is apparent from the foregoing statement by the United States that there is nothing of record which would support a finding that the prescribed routes are more efficient than the *direct* routes of the Pennsylvania from points of origin to points of destination.

While relying upon their contention that the comparisons contemplated by clause (b) are as between the proposed routes and the existing *direct* routes, it should here further be noted that even if the proper comparison were as between the proposed and existing routes *via Hagerstown*, there would still be no record support for the Commission's ultimate finding with respect to relative efficiency as concerns the *entire routes* from points of origin to points of destination.

If, for example, the efficiency of the several routes is to be considered from the standpoint of the elapsed time of movement thereover from point of origin to point of destination, then the record will be found to be devoid

of information comparing the prescribed and the existing routes via Hagerstown. Fragmentary information on this subject the record contains, but no such evidence as would support a finding of more expeditious service over the prescribed routes than over existing routes via Hagerstown *from point of origin to point of destination.*

A witness for complainant made reference to the lesser distance over the proposed routes from Chicago to Salisbury than over the Pennsylvania's route via Hagerstown (Ex. 5, R. 359, 221-222), and stated (R. 222):

> "It makes quicker time and the service is more efficient and economical, * * *."

On cross-examination the same witness, upon being questioned as to the basis of his request for establishment of through routes via York and Fulton Junction, stated that he "was advised" that that was the quickest route; that he asked the Western Maryland Railroad and other traffic people, and that if the shipment were delivered via the Western Maryland and the Pennsylvania at Hagerstown "you lose one day right off the reel" (R. 228-229).

In response to a question from the Commission's Examiner, the witness then testified:

> "EXAM. BERRY:—Well, I do not still see why there would be a day lost, a day more required to move by the way of Harrisburg than York; that is what I was trying to find out.
>
> "THE WITNESS:—Well, of course, *we are not moving anything by this requested route* because we have no rates that way, *so I do not know what the experience is*, and I do know the experience the other way moving.
>
> "EXAM. BERRY:—You do not know that you would gain a day by moving via York?
>
> "THE WITNESS:—That is what I was advised it would be" (R. 230). (Italics inserted.)

Subsequently the witness was interrogated by the Examiner (R. 238-239) as to an earlier statement (R. 219) that the proposed routes would save four days' time involved in the back-haul service on the Pennsylvania to and from Hagerstown, and in the switching by the Western Maryland at that point. Following the questions by the Examiner on this subject the witness testified on cross-examination as follows (R. 240):

> "Q. (By Mr. Eshelman):—And you did not say, or have you obtained any information as to the length of time that it would take for either of the movements to destination, we will say to a similar destination via either of the sought routes through York or Fulton Junction?
>
> "A. *No, those routes are not in effect, so I could not say what they are.* (Italics inserted.)

It must therefore be apparent that so far as any lesser time in transit over the proposed through routes than over the existing routes of the Pennsylvania via Hagerstown, the testimony of complainant's witness is unsubstantial, and is therefore insufficient to sustain the Commission's finding as to their relative efficiency.

2. IF ONLY THE PORTIONS OF THE PRESENT AND PROPOSED ROUTES EAST OF HAGERSTOWN ARE COMPARED, THERE IS NO BASIS OF RECORD FOR A FINDING THAT THE LATTER ARE MORE EFFICIENT.

Complainant's witness testified that the average time required for the movement of a car from Hagerstown via the Pennsylvania to the Eastern Shore is three to four days (R. 238). However, no corresponding length of time was shown by complainant for the movement over the prescribed routes from Hagerstown to the same destinations.

As against the absence of substantial evidence of greater efficiency in the prescribed routes, the record contains definite comparisons of the elapsed time of the freight train schedules via the present and proposed routes from Hagerstown to representative destinations, which show the latter to be inferior to the present routes. Thus, as based upon the testimony of a competent railroad operating officer (R. 349-350), the comparisons are shown to be as indicated in the following tabulation:

COMPARISONS OF ELAPSED TIME OF SCHEDULED TRAIN SERVICE FROM HAGERSTOWN, MD., TO SALISBURY, MD., AND CAPE CHARLES, VA.

	To Salisbury		*To Cape Charles*	
Route	*Hours*	*Minutes*	*Hours*	*Minutes*
P. R. R.	31	30	39	15
	24	45	29	55
W. M.-P. R. R.				
via Fulton Jct. ..	33	00	45	45
via York	36	30	49	15

Although the foregoing comparisons were based on the only competent evidence with respect to the relative time of movement over the routes from Hagerstown, the Commission refused to find in accordance therewith on the ground that the witness stated that in cases of storms and at times of excessive traffic there were delays which prevented the making of the schedules, and on the ground that no explanation was given as to why a longer time is required for the haul from Salisbury to Cape Charles for traffic moving over the route sought than over the Pennsylvania's route via Enola Yard (R. 37).

The emergency conditions mentioned by the witness (R. 350), which at times affect ability to maintain the arranged schedules, are necessarily not peculiar to any railroad or route, and for purposes of comparison it is

obviously erroneous for the Commission to assume, without a basis of record, that storms, excessive traffic, and similar conditions would not affect the prescribed routes in common with existing routes. Indeed, such assumption is directly contrary to the following statement of the witness which indicates that other railroads were likewise affected (R. 350):

> "Q. Do you always make this schedule?
>
> "A. In cases of storms, like we had last spring, where every road was tied up, not only in Pennsylvania, but other competing lines, we would not make it, could not make it, physically make it."

Similarly the Commission's disregard of the positive and uncontroverted testimony by the only operating witness on the subject, of the relative amounts of time required for the movement from Hagerstown to the Peninsula over the existing and the proposed routes, on the ground that no explanation was given as to the reason for the greater difference in time via the two routes in the case of Cape Charles than in the case of Salisbury, represents an unwarranted and erroneous excursion from the record to defeat the uncontradicted evidence (R. 37). The fact is that the witness was not cross-examined on the point nor was any opportunity given him to make the explanation if one was desired. This criticism contained in the Commission's report first appeared in the proposed report of the Examiner, and in their exceptions defendants, although under no burden of proof in the matter, but merely as an evidence of good faith, reproduced a statement from Witness Clark (subsequent to the receipt of the proposed report) which explained the reason for the greater disparity. This statement is reproduced in Petition of Defendants for Reargument and Reconsideration (R. 156). Complainant's reply to such exceptions objected to the consideration of such statement (R. 156-157). (Also see Reply of Complainant to said Petition

(R. 191-192).) Granting that the Commission, under these circumstances, was not entitled to receive or to rely upon such explanation of the witness, in view of complainant's objection and lack of opportunity for cross-examination, the Commission was not justified in failing to make the findings required by the facts of record and in disallowing their force on the basis of an unjustified assumption.

To destinations other than those on the Peninsula, such as Milford, N. J., and Chatham, Pa., specified in complainant's Exhibits 3 and 4 as destinations in which it is interested, the only evidence of record with respect to train service was that of Witness Clark, which was to the effect that better service would be available from Hagerstown over the Pennsylvania's routes via Enola than over the proposed routes via York or Fulton Junction (R. 349, 351). This testimony was uncontroverted.

3. THE COMMISSION ERRONEOUSLY REFUSED TO CONSIDER DEFENDANTS' EVIDENCE OF DIFFICULT OPERATIONS INCIDENT TO INTERCHANGE AT YORK AND FULTON JUNCTION BASED ON ITS UNJUSTIFIED FINDING UNDER SECTION 3 (4).

a. In determining the efficiency of the routes the Commission erroneously disregarded this evidence.

There has been pointed out above* the nature of the Commission's error in assuming that, in the determination of the relative efficiency of routes under clause (b), it is entitled to disregard evidence of difficult operating conditions affecting the proposed routes on the ground that such evidence would indicate an omission to comply with the duty under Section 3 (4) of the Act, 49 U. S. C. 3 (4),† to afford all reasonable, proper, and equal facili-

* *V. supra*, p. 84.

† Appendix 4, *infra*, p. 6a.

ties for the interchange of traffic between their respective lines and connecting lines. This error of law was doubtless responsible for the Commission's disregard (R. 37-38), in determining the relative efficiency of the routes involved, of defendants' evidence of the difficult operating conditions incident to the interchange at York and Fulton Junction.

b. Description of the difficult operating conditions incident to interchange at York and Fulton Junction.

The operating witness explained how the freight train service of the Pennsylvania converges upon and disperses from Enola Yard, and how traffic routed through that junction receives the benefit of the scheduled train movements to and from that center (R. 338-341). He also explained how traffic which does not reach the Pennsylvania so as to enter that stream, but reaches it at other such points such as York or Fulton Junction, which are not primary points for the make-up and dispatchment of Pennsylvania freight trains, does not secure the advantage of movement in the arranged freight train schedules, but necessarily would enjoy a less expeditious movement (R. 340-345).

In this connection the witness described the limited facilities and difficult operating conditions incident to the interchange of through traffic between the Western Maryland and the Pennsylvania at York and Fulton Junction. Thus, the interchange between the Western Maryland and the Pennsylvania at York is not such as to make a route *through* that junction an efficient one. The interchange track is about 3 miles from the Pennsylvania's yard and to get cars from it the Pennsylvania engines must pass through city streets, passing 18 crossings at grade. This movement is through a heavy industrial area, and interference from switching engines is frequent. While York

was established by the Commission as an interchange point between these roads for taking care of traffic originating or terminating in that area,* it would not be satisfactory as a junction on through traffic. The scheduled freight train service from York to Eastern points operates over a single-track line of limited capacity to Columbia, Pa., 13 miles distant. Here cars for the Eastern Shore would have to be cut out and placed so as to be picked up by a train operating out of Enola Yard through Perryville, Md., to Edge Moor Yard near Wilmington. Here further classification would be necessary (R. 343-345).

From an operating standpoint Fulton Junction would be inefficient as an interchange point on this traffic. There is but one interchange track at that point. It holds about 28 cars and is used by both roads, as well as serving three private sidings (R. 340-342). Cars received from the Western Maryland at this point must be handled to the Pennsylvania's Gwyn's Run Yard, about 1½ miles south. This involves a partial use of a main passenger track near the south entrance to the B. & P. tunnel. Because of the large number of train movements through this tunnel—an average of 177 per day—there is much interference to such freight movements (R. 341-343).

After moving through the B. & P. tunnel which is 1½ miles long, the cars received from the Western Maryland as described pass through the intricate Baltimore Union Station track layout and thence through the Union Tunnel which is six-tenths of a mile long, and from there to Bay View Yard. This yard is about 10 miles from Gwyn's Run Yard. At that point cars so handled would be dispatched in road trains. Considering the train density and block restrictions through the Baltimore tunnels and station area, Fulton Junction would not be an efficient point of interchange for this traffic (R. 340-343, Ex. 67, R. 468, 358).

* York Mfrs. Asso. *v.* P. R. R. Co., 107 I. C. C. 219 (1925).

4. COMPLAINANT'S EVIDENCE AS TO RAIL AND TRUCK SERVICE VIA ELSMERE JUNCTION CANNOT SUPPORT THE COMMISSION'S FINDING AS TO THE RELATIVE EFFICIENCY OF THE PRESENT AND PRESCRIBED ROUTES.

The irrelevancy of complainant's reference to the movement of certain of its shipments via rail and truck through Elsmere Junction, Del., to the question of the relative efficiency of the proposed and present routes has been dealt with above.* As there noted, the comparison of routes contemplated in clause (b) is of all-rail routes and not of such routes by rail and truck.

But the Commission's finding is otherwise contrary to the record. *The reason for shipping the 640 cars* from Hagerstown over the Western Maryland and the Reading *to Elsmere Junction* and then *by truck* to points on the Delmarva Peninsula, rather than over the route of the Pennsylvania, *was that the grain had not come inbound over the Pennsylvania, and therefore was not entitled under its transit tariff to move outbound over that line.* This is clearly established by a comparison of complainant's inbound and outbound tonnage over the Pennsylvania. Thus, Exhibit 60 (R. 459, 308, 338) shows that for the years 1938, 1939, and 1940, the Pennsylvania handled for account of complainant at Hagerstown 890 cars inbound and 1309 cars outbound. Based on the average weights of 66,044 pounds inbound and 49,200 pounds outbound, this movement amounted to 58,775,600 pounds inbound and 64,402,800 pounds outbound. While the excess of the outbound tonnage over the inbound tonnage may be due to the time lag between the inbound and outbound movement of particular shipments, it furnishes convincing evidence that the reason for not shipping out over the Pennsylvania all or part of the 640 cars which moved to Elsmere Junction—equivalent to 31,488,000 pounds—was due to the fact that complainant did not have available

*V. *supra*, p. 83.

the inbound P. R. R. billing which would be necessary to entitle the outbound products to move to Peninsula destinations under the applicable P. R. R. transit tariff.*

C. The Commission's Ultimate Finding As to the Greater Economy of the New Routes Is Not Supported By, But Is Contrary To, the Evidence and the District Court Erred In Concluding Otherwise.

1. COMPLAINANT'S ONLY EVIDENCE AS TO RELATIVE ECONOMY OF OPERATION RELATED TO THE DISTANCES VIA HAGERSTOWN.

While, as noted above,† the conclusions of the Commission and of the Court below in actuality depend solely upon the greater advantage which would result to the Hagerstown manufacturer from the prescription of the new routes, their decisions in terms construe clause (b) as requiring consideration of the relative economy of operating the present and proposed routes (R. 40, 94). It is therefore in order to review the evidence to ascertain whether it contains anything which would support the ultimate findings that the new routes are needed in order to provide more economic transportation.

With one exception it will be found that complainant introduced no evidence with respect to relative economy

* The 56th Annual Report of the Interstate Commerce Commission—1942—contains at page 76 a report of failure of carriers and shippers to comply with tariff provisions providing transit privileges on grain. It there stated in part:

> "The transit rules require that freight bills for in-bound shipments to the transit point be registered with the carriers by the operators of all elevators or mills for the purpose of availing themselves of the privileges provided in the tariffs, and that, when a quantity of grain is forwarded from the transit point, a paid freight bill for a similar amount of grain which moved in-bound to the transit point must be surrendered to the carriers."

The Commission's 57th Annual Report—1943—contains reference at page 82 to an indictment against a grain shipper which "made it a practice to surrender against out-bound shipments from a transit point in-bound freight bills which it was not entitled to use for transit purposes."

† *V. supra*, p. 20.

of operation of the proposed routes and the existing *direct* routes. This exception related to the distances over the proposed routes as compared with those of the Pennsylvania via Hagerstown.

To illustrate the situation there are set forth below the distances from Chicago, Ill., to Salisbury, Md., and from East St. Louis, Ill., to Milford, N. J., over the direct routes of the Pennsylvania, and also over its routes via Hagerstown, as compared with the distances over the prescribed routes via York and Fulton Junction. These are based on Exhibits 68 and 69 (R. 467-474, 351-355, 358).

DISTANCES OVER PRESENT AND PRESCRIBED ROUTES

Route	*Chicago to Salisbury Miles*	*East St. Louis to Milford Miles*
P. R. R. Direct	902	1,027
P. R. R. via Hagerstown	1,051	1,176
N.Y.C.—P.&L.E.—W.M.—P.R.R.[1]		
via York—	958	1,150
via Fulton Junction	946	1,171
Wabash—W. & L.E.—P.&W.Va.—W.M.—P.R.R.[2]		
via York	950	1,132
via Fulton Junction	938	1,153

[1] Route 1 as prescribed (R. 38, 42-43).
[2] Route 2 as prescribed (R. 38, 42-43).

If, as contended by appellants, the direct routes furnish the only proper comparison, then the direct routes of the Pennsylvania are the shorter. But if the Pennsylvania's routes via Hagerstown are used for purposes of comparison it will be found that the prescribed routes are somewhat shorter. But in the matter of operation economy is not to be measured only in miles. This was

clearly recognized in the discussion between the members of the Senate Subcommittee holding hearings on S. 1085 and Commissioner Eastman, pp. 9, 17. The first of these references is quoted *supra*, pp. 62, 63. Other elements enter into the question of economical operation, such as the number of railroads participating therein and the amount of expense for interchange between them. This feature will next be noted.

2. THE PRESCRIBED ROUTES WOULD SUBSTANTIALLY INCREASE THE NUMBER OF PARTICIPATING CARRIERS AND THE INTERCHANGE EXPENSE.

On traffic coming from beyond the market points such as Chicago and East St. Louis, the prescribed through routes would substitute 4-line and 5-line hauls for the single-line haul of the Pennsylvania (Ex. 68, R. 467, 358). As the Court below, in this same connection, further found:

> "It is true the evidence introduced before the Commission by the carriers was uncontradicted to the effect that the prescribed new routes would substantially increase the number of participating carriers and the number of interchange services. For example, on traffic originating at points in Central Territory (including market points not served by the Pennsylvania), these routes would, generally speaking, substitute 4 or 5-line hauls for 2-line hauls via the Pennsylvania; and where the traffic did not originate on the New York Central or the Wabash, would, generally speaking, involve 5 or 6-line hauls" (R. 99).

It is generally recognized that the interchange expense incident to multiple-line hauls as compared with single-line hauls is substantial.* This is specifically shown in

* See for example data on cost of intercarrier interchanges from Freight Traffic Report of the Federal Coordinator of Transportation, May, 1935, Vol. I, pp. 104-105, excerpts from which appear in printed Hearings on S. 1261 before subcommittee of House Committee on Interstate and Foreign Commerce (75th Cong., 2nd and 3rd sessions) pages 143-144. They also appear at pages 140-141 of printed Hearings on H. R. 3400 (76th Cong., 1st sess.) before a subcommittee of the same House Committee.

instant case in Exhibit 68 (R. 467, 358). Thus in the
of the direct single-line route of the Pennsylvania
n Chicago to Salisbury, Md., there is no expense in-
ed for intercarrier interchange. But in the case of
prescribed multiple-line routes via York and Fulton
ction the interchange expense is an important item.
s appears from the following comparison of per car
s taken from that Exhibit:

INTERCHANGE COSTS—CHICAGO TO SALISBURY.

Route	*Operating Expenses Only*	*Full Costs**
R. R.	—	—
.C.—P.&L.E.—W.M.—P.R.R.[1] (via Fulton Jct.)	$29.98	$56.89
bash—W.&L.E.—P.&W.Va.—W.M. —P.R.R.[2] (via York)	38.88	73.68

[1] Route 1 as prescribed (R. 38, 42-43).
[2] Route 2 as prescribed (R. 38, 42-43).

The foregoing costs were uncontroverted.

If comparison were made of the prescribed routes
h the Pennsylvania's route via Hagerstown, the show-
as to interchange expense would be similar to that
ve indicated. The switching service which is done for
Pennsylvania by the Western Maryland at Hagerstown
paid for by the Pennsylvania (R. 30) and the service
therefore to be regarded as a Pennsylvania *terminal*
t interchange) service in each direction. Cf. Ex. 69,
473, 354-355, 358.

3. THE CARRIERS' COST DATA SHOWED THAT PERFORMANCE TRANSPORTATION OVER THE PRESCRIBED ROUTES WOULD BE CH LESS ECONOMIC THAN OVER THE EXISTING ROUTES.

The uncontroverted evidence of record is to the effect
t performance of the physical transportation over the

* Includes operating expenses, rents, taxes, 5.75% return, and passenger iency.

prescribed through routes would be much less economic than over the existing routes. This is shown by the comparative cost data computed from the annual reports of the carriers to the Commission for the year 1940 and set forth in Exhibit 68 (R. 467, 351, 358). Based upon an assumed direct movement of 33 tons in box-car equipment (without stop for transit at Hagerstown) the following tabulation makes comparison of the freight service cost for the existing and prescribed routes from Chicago to Salisbury, and from East St. Louis to Milford:

COMPARATIVE FREIGHT SERVICE COSTS.

(FOR DIRECT MOVEMENT—NO STOP AT HAGERSTOWN FOR TRANSIT)

Route	*Operating Expenses Only*	*Full Costs**
From Chicago, Ill., to Salisbury, Md.		
P. R. R. Direct	$121.07	$229.93
Route No. 1, via York[1]	165.81	327.85
Route No. 2, via Fulton Junction[2]	206.23	358.49
From East St. Louis to Milford, N. J.		
P. R. R. Direct	$133.06	$252.70
Route No. 1, via York[1]	184.94	369.57
Route No. 2, via Fulton Junction[2]	202.64	387.04

[1] New York Central to Youngstown, Ohio, Pittsburgh & Lake Erie to Connellsville, Pa., Western Maryland to York, Pa., and Pennsylvania beyond.

[2] Wabash to Toledo, Ohio, Wheeling & Lake Erie to Pittsburgh Junction, Ohio, Pittsburgh & West Virginia to Connellsville, Pa., Western Maryland to Fulton Junction, and the Pennsylvania beyond.

While the direct routes clearly furnish the proper basis for comparing the economy of the proposed routes, it is notable that even if the comparison is made with the Pennsylvania's routes via Hagerstown, the costs of opera-

* Includes operating expenses, rents, taxes, 5.75% return, and passenger deficiency.

tion thereover are disclosed to be less than over either of the prescribed routes. In the following tabulation there are shown the comparative freight service costs over these routes based on an assumed carload movement in box-car equipment of 33 tons to Hagerstown for stopping in transit, and of 1.34 cars of outbound products at 24.6 tons therefrom.

COMPARATIVE FREIGHT SERVICE COSTS.

(VIA HAGERSTOWN FOR TRANSIT)

Route	*Operating Expenses Only*	*Full Costs**
From Chicago, Ill., to Salisbury, Md.		
P. R. R.	$184.10	$349.65
Route 1, via York[1]	191.18	377.64
Route 2, via Fulton Junction[2]	232.08	409.32
From East St. Louis, Ill., to Milford, N. J.		
P. R. R.	$196.09	$372.42
Route 1, via York[1]	211.08	421.15
Route 2, via Fulton Junction[2]	227.33	435.54

[1] New York Central to Youngstown, Ohio, Pittsburgh & Lake Erie to Connellsville, Pa., Western Maryland to York, Pa., and Pennsylvania beyond.

[2] Wabash to Toledo, Ohio, Wheeling & Lake Erie to Pittsburgh Junction, Ohio, Pittsburgh & West Virginia to Connellsville, Pa., Western Maryland to Fulton Junction, and the Pennsylvania beyond.

Although there was no burden of proof on the defendant railroads, the cost data introduced by them, from which the foregoing summary is taken, established that the cost of transportation over the proposed routes, which the Commission has now prescribed, would be greater than over the existing routes of the Pennsylvania via Hagerstown. This evidence was not controverted. Never-

* Includes operating expenses, rents, taxes, 5.75% return, and passenger deficiency.

theless, the Commission made no finding in accordance therewith, and further failed to make any finding concerning the comparative costs of transportation over the prescribed and existing routes.

The Commission disregarded the said cost data on the stated ground that "its value, if any, is limited to average system costs of all less-than-carload and carload freight, while here we are dealing with a heavy loading commodity moving comparatively long distances in well-defined channels."

The errors of the Commission in this respect were several. Thus, by its disregard of the railroads' cost data, it in effect placed on them the burden of proving that the existing routes are more economical of operation than the proposed routes. But the law casts no such burden on defendants, but rather on the complainant to prove that transportation over such routes can be performed more economically than over the existing routes. This is implicit in the very form of the statute which prohibits short-hauling "unless" the exceptional conditions are made to appear.

The Commission's disregard of the cost comparisons on the ground that they merely represented "average system costs of all less-than-carload and carload freight," was without justification, since if it had made any analysis at all of the cost data underlying the comparisons it would have noted that the costs applicable to less-carload traffic, such as platform costs, etc., were eliminated, and were not included in the cost comparisons of the respective routes.

The criticism of the costs as representing "average system costs" was likewise unjustified. The criticism of system average costs as such generally relates to the use of average unit costs, such as costs per car-mile or per ton-mile, which include both line and terminal elements on an average basis. These may fail of reliability where applied for distances shorter or longer than the average

hauls in which such costs were incurred. *Baltimore & O. R. Co.* v. *United States*, 9 F. Supp. 181, 192, 196 (1934). This criticism is obviated if costs are computed under a proper separation of line and terminal cost elements. In the instant case the formula employed by the witness for such separation was that contained in the Commission's Bureau of Statistics Statement No. 3812 of March, 1938, with certain changes as indicated in Exhibit 68 (R. 476, 351-354, 358). While the issuance by the Commission's Bureau of this formula does not bind the Commission, the fact of its issuance indicates a serious and considered effort on the part of impartial persons expert in such matters to outline a reasonably reliable basis for cost ascertainment. Moreover, it is to be noted that defendant railroads did not undertake to ascertain precise or exact costs of handling particular cars or particular traffic, but only to determine the relative economy of transportation over the proposed and existing routes. It is this relative comparison that clause (b) undoubtedly contemplates. See in this connection the statement of Commissioner Eastman before the Senate subcommittee holding hearings on S. 1085 quoted above.*

In disregarding these cost comparisons on the ground that "here we are dealing with a heavy loading commodity", the Commission necessarily assumed that the loading of the traffic involved—which is 33 tons inbound to Hagerstown and 24.6 tons outbound—is heavier than the average of all traffic. There is nothing in the record to warrant this assumption. On the contrary, had the Commission preferred the fact to the assumption it could have ascertained (as indicated in the Petition of Defendants for Reargument, R. 167) that complainant's traffic was not "heavy loading" as compared with the average load of revenue carload freight for the railroads involved in the routes prescribed.

---

*V. *supra*, pp. 62, 63.

While the science of railway cost accounting has not developed to a point where a railroad can with exactness apportion to the transportation of a particular commodity its fair portion of costs incurred in common with the transportation of other commodities or of passengers, both the Supreme Court and the Commission have indicated that resort may at times be had to costs based on average costs of all traffic. *Atlantic Coast Line* v. *Florida*, 203 U. S. 256; *Wood* v. *Vandalia R. R. Co.*, 231 U. S. 1, 6, 7; *Smyth* v. *Ames*, 169 U. S. 466; *Georgia Pub. Serv. Comm.* v. *Atlantic Coast Line R. Co.*, 186 I. C. C. 157, 184. In *Baltimore & O. R. Co.* v. *United States*, 298 U. S. 349, the so-called *Citrus Divisions Case*, the Supreme Court, in sustaining the decree of the Court below (9 F. Supp. 181), considered the cost data there relied on to prove confiscation, which data—unlike those of record here—had not been computed upon a separation of line and terminal costs, and said on this point at page 378:

> "The burden on appellants, heavy though it is, does not require them to prove with arithmetical accuracy the cost of the transportation covered by the challenged divisions or the value of the property used to perform it, or the proportion attributable to that service. It is enough, if the evidence preponderating in their favor reasonably warrants findings sufficient to support the decree sought. Many issues as to which demonstrable accuracy is impossible have to be decided by the courts. *In ascertaining costs of transportation of one out of many commodities hauled by railroads it is impossible to attain precision. Mere lack of it is not ground for objection either to the evidence offered or the facts which it tends to prove.*" (Italics inserted.)

IV. CONCLUSION.

Appellants respectfully submit that whether clause (b) be interpreted only in accordance with the natural meaning of the words, or in the light of the objectives indicated in the national transportation policy declared by the Congress, or whether in the more specific light of its own legislative history, there can be no escape from the conclusion that it is not operative except there be a finding that the existing routes do not provide adequate transportation from point of origin to point of destination and that the proposed routes between those points can be operated more efficiently or more economically than the existing routes. The Commission's order, and the decree of the District Court sustaining it, are founded upon the erroneous conclusion of law that clause (b) is operative if the new routes would prove advantageous to a transit operator in the territory intermediate between origin and destination, regardless of the fact that the individual interest of such operator may be adverse to that of the general public, and regardless of whether transportation over the new routes could be performed more efficiently or more economically. As a result of this mistake of law the Commission acted in excess of its lawful power.

Appellants also submit that the decree of the District Court should be reversed for failure to set aside the Commission's order in that neither such order nor the Commission's ultimate finding upon which it is based are supported by the essential or basic findings necessary to its validity.

These appellants further submit that the findings of the Commission on which its order is based are not supported by substantial evidence, but are contrary to the evidence of record, and that the order is accordingly arbitrary and invalid.

WHEREFORE, it is submitted that the decree of the District Court is in error and should be reversed with instructions to sustain the petition and to set aside the Commission's said order.

H. C. BARRON,
CHARLES CLARK,
A. B. ENOCH,
P. F. GAULT,
THOMAS P. HEALY,
H. H. LARIMORE,
A. H. LOSSOW,
W. A. NORTHCUTT,
L. H. STRASSER,
CARSON L. TAYLOR,
Of Counsel.

R. AUBREY BOGLEY,
FRANCIS R. CROSS,
WM. PEPPER CONSTABLE,
JOHN DICKINSON,
JOSEPH F. ESHELMAN,
Counsel for Appellants.

DECEMBER 20, 1944.

APPENDIX 1.

Act to Regulate Commerce as Amended by Mann-Elkins Act of June 18, 1910, 36 Stat. L. 539 (552).

Third and fourth paragraphs of Section 15.

"The commission may also, after hearing, on a complaint or upon its own initiative without complaint, establish through routes and joint classifications, and may establish joint rates as the maximum to be charged and may prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated, whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint classifications or joint rates; and this provision shall apply when one of the connecting carriers is a water line. The commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character, nor shall the commission have the right to establish any route, classification, rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water.

"And in establishing such through route, the Commission shall not require any company, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established."

APPENDIX 2.

Act to Regulate Commerce As Amended by Transportation Act of 1920, February 28, 1920, and renamed as Interstate Commerce Act. 41 Stat. L. 456 (457, 485, 486).

Paragraphs (3) and (4) Sec. 15.

"(3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, or the maxima or minima, or maxima and minima, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated; and this provision, except as herein otherwise provided, shall apply when one of the carriers is a water line. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character; nor shall the Commission have the right to establish any route, classification, or practice, or any rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water.

"(4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line), require

any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established: *Provided*, That in time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."

APPENDIX 3.

Interstate Commerce Act as Amended by Transportation Act of 1940, September 18, 1940, 54 Stat. L. 898 (911-912).

Paragraphs (3) and (4) Sec. 15.

"(3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carrier subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and mimima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

"(4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in

such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."

APPENDIX 4.

Interstate Commerce Act as amended by Transportation Act of 1940, September 18, 1940, 54 Stat. L. 898 (903-904).

Section 3 (4)

"(4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

APPENDIX 5.

Excerpts from Printed Hearings Before Congressional Committees On Bills to Repeal the Short-Haul Rule.

For more convenient reference the following excerpts from the Hearings on S. 1261 will be set forth under the same subject headings as are used in the brief, *supra*, pp. 46-52.

(1) *Protection of investment of initial carrier.*

Mr. Paul P. Hastings, Vice President of the Atchison, Topeka & Santa Fe Railway system, testifying before a Subcommittee of the House Committee on Interstate and Foreign Commerce (75th Cong., 2d and 3d Sess.) on S. 1261, after noting that more than 50 percent of its total mileage was classed by the Commission as branch line railroad, stated at pages 109-110 of the printed Hearings:*

> "While these branch lines were in part constructed or acquired in some instances to serve oil fields, coal, and other mineral deposits, or lumber-producing territory, generally and in the main they serve agricultural regions more or less sparsely populated and of relatively light density of traffic. It is a generally well-known and accepted fact that practically all of the branch lines of the Santa Fe system could not exist or be operated at a profit were they operated as separate and independent railroads, and it is only by their operation as a part of the Santa Fe system, and the handling of traffic to and from points on such branches over the main lines of railroad of the Santa Fe, that a profit can be realized from such traffic and the system as a whole operated profitably. Obviously, therefore, the investment made in the past in these branch lines is jeopardized and similar investments

*These House Committee hearings on S. 1261 were incorporated in the Hearings on H. R. 3400 (76th Cong., 1st Sess.), wherein the indicated testimony of this witness appears at pages 106-107.

in the future made unattractive and undesirable if the principle be announced that the Santa Fe may be required, in respect to traffic originating on these branches, to turn it over to another line, generally a competitor, at the first junction after it reaches the main line, or before it reaches a main line, notwithstanding the fact that the route of the Santa Fe from origin to destination is reasonably direct and its service adequate and satisfactory to the shipper. In these cases it is the Santa Fe that has risked its money in pioneering in its own and the public interest. A policy is obviously unfair that would unduly deprive it of the fruits of such investment and pioneering for the benefit of some competitor which has not assumed the risk of loss of its capital in the new territory."

To somewhat similar effect is the following from the statement of F. R. Newman, Vice President, Great Northern Railway Company, at page 117 of the Hearings on S. 1261 (pp. 114-115 of Hearings on H. R. 3400):

"The maps referred to before will indicate numerous branches that have been built in order to open up new agricultural development and such investments have been made by the Great Northern and Northern Pacific so that they will enjoy and should be entitled to the long haul on the products which is a result of such development, so long as such routes give the Great Northern and Northern Pacific a maximum haul without undue circuity. If such assurances were taken away there would be no incentive for the investment incidental to the construction of such branches and it is improbable that such branches would have been built had we not felt that the interest of these two companies would be protected and for the further reason that the investment could not

have been justified by the traffic moving solely on these branch lines.

"It has been found necessary in assisting the development of new industries to make rates on raw products to points where such industries are located that are less than what might be termed reasonable rates considered in and of themselves. For example, sugar beets to sugar refineries, logs to lumber mills. These rates are made in anticipation of obtaining a reasonable haul upon the out-bound products resulting from the in-bound haul of raw products and if there were no assurance of obtaining a profitable haul upon the lumber and sugar, we would naturally be reluctant to establish lower rates on the in-bound haul of raw commodities."

R. J. Doss, Traffic Manager, Atlantic Coast Line, speaking for numerous Southern railroads, including appellants Louisville & Nashville and Southern Railway, stated at page 171 of the Hearings on S. 1261 (also reported at pages 166-167 of the printed Hearings in H. R. 3400), as follows:

"The railroads have invested millions of dollars in providing branch, gathering, or feeder lines. Of late years they have been able to do this only after obtaining a certificate of convenience and public necessity from the Interstate Commerce Commission. To obtain it they must show the Commission the purpose of the proposed branch line and the estimated revenue expected from its operation. These estimates are based on the volume of traffic expected to be developed and upon the assumption that it will move over customary and economical routes. Feeder lines have been built for the purpose of bringing traffic to the main line even though it was known that the local traffic on the branch lines would not be enough to

justify their operation. The expenditure has been justified because of the revenue which the trunk line owning the branch line expected to obtain for its long haul on business originating upon the gathering lines. No railroad will plan the construction of added mileage unless it can expect that there will be full utilization of its transportation plant in handling the tonnage which is expected to be developed.

"If, after a new extension is constructed, the railroad is not permitted to fully utilize its facilities, the purpose of the construction is largely nullified and the investment in the property is placed in jeopardy. Many branch lines intersect other railroads, and, even if they do not, the trunk line usually intersects another railroad a short distance beyond its junction with the branch line. If the trunk line is forced to surrender the branch-line traffic to its competitors before the traffic reaches the main-line junction, or even after performing a short haul beyond the trunk-line junction, where is the safety of the investment which has been made? The effect of this bill would be to take away from one railroad the fruits and rewards for what has heretofore been a conservative and proper investment and to give the fruits and rewards from that investment to another railroad which has made no capital expenditure in connection therewith. It takes away from railroads all incentive to extend their lines into virgin territory and there develop traffic."

To the same general effect see the statements of:

E. W. Soergel, Assistant Freight Traffic Manager of the Chicago, Milwaukee, St. Paul & Pacific Railroad, page 122, Hearings on S. 1261 (pages 119-120 of Hearings on H. R. 3400); and

D. R. Lincoln, Assistant to Chief Traffic Officer, Missouri Pacific Lines, pages 130-134 of Hearings on S. 1261 (pp. 127-132 of Hearings on H. R. 3400).

(2) *Protection of initial lines in the operating expense of originating traffic.*

Mr. D. R. Lincoln, Assistant to Chief Traffic Officer, Missouri Pacific Railway, testifying before a Subcommittee of the Senate Committee on Interstate Commerce on S. 1085 (76th Cong., 1st Sess.) at pages 27, 81 of the printed Hearings, stated:

"MR. LINCOLN:—In order to provide adequate service, sufficient equipment, and all facilities necessary to take care of the traffic that is offered in a great many instances a considerable expense is entailed with respect to the empty cars which are required to be hauled long distances, to take care of the business. For instance, in the State of Kansas, with a large wheat crop, there is assembled every summer, in advance of that crop, perhaps 10,000 freight cars.

"SENATOR REED:—As high as 30,000, Mr. Lincoln. I say that because I am more familiar with that than you are, I believe.

"MR. LINCOLN:—Well, perhaps 30,000 cars are placed in that field, anticipating the movement of that wheat crop. Those empty cars are pulled all the way from Chicago and St. Louis by the loading lines—distances of 300 or 400 or 500 miles. When those cars are loaded with wheat for through movement, it stands to reason that the railroads having performed the empty-car haul for those long distances should not be required to surrender that traffic at the first junction or the second junction. In the case of perishables, we have to provide refrigerator cars, anticipating the movement of the perishable commodities. In some instances, if the crop is about ready to be harvested—such as tomatoes, for instance—we anticipate that movement by having 400 or 500 cars assembled from the field. We assemble the cars; we have to provide icing facilities and ice to take care of the

reicing of that freight along that route. Now, it occasionally occurs that the weather conditions will cut that crop 25 percent or perhaps 50 percent; and as a result of that, we have a lot of empty equipment, down there, that is not used but which we have hauled long distances.

"Again I say that when that perishable freight moves, the line that has performed the long empty haul and that has provided the facilities to take care of that perishable movement, certainly should not be required to turn over that traffic to their competitor at the first short junction. That situation pertains in the Rio Grande Valley, with respect to fruits and vegetables, and in Colorado, with respect to tomatoes and potatoes, and pertains all over the country, as to perishable fruits.

"My observation is that the short line's particular interest in this proposition is the transit, storage-in-transit, stop-overs, and so forth. And in all of those instances the freight would be deflected from the natural direct route from origin to destination, in order that somebody off the main route or the reasonable through route may be permitted to be placed upon the same plane as the man who is more fortunately situated on the direct route."*

(3) *Protection of investments of destination lines in terminal facilities.*

Mr. Harry Wilson, Vice President of the Traffic Executive Association, Eastern Territory, speaking for numerous Eastern railroads, testified at the House Committee hearings on S. 1261, with respect to this subject, as follows at page 153:*

* This testimony also appears in the Hearings on H. R. 3400, at pages 150-151.

"The eastern railroads have spent large sums of money in developing their roads and also their destination terminal facilities. The cost of operating these terminal facilities represents a very large part of the cost of transportation service. In some cases, special facilities have been built by the trunk lines at their terminals to take care of certain classes of traffic which requires special attention. A case in point is that of fruits and vegetables to eastern cities. Several of the trunk line carriers have provided special facilities at terminals for this traffic. These facilities were developed with the thought in mind that said railroads would enjoy the longest haul and a maximum amount of revenue on such fruit and vegetable traffic. These railroads have their own lines from Chicago, and the Mississippi River and the Ohio and Potomac Rivers to the seaboard and if this bill is enacted into law it will be possible for the Interstate Commerce Commission to force these through lines to take in other lines forming a joint route for no other purpose than to afford transit services such as storage and diversion just as the Commission originally proposed to do in the *Hagerstown milling-in-transit case* previously cited, and deplete the revenues of some lines for the benefit of others and increase the cost of operation, thereby reducing the net revenue of the railroads as a whole."

Witness R. O. Small, General Freight Agent of the Chicago & North Western Railway Company, testifying at page 139 of the Hearings on S. 1261* stated in part as follows:

"During the past 14 years the average length of haul on carload freight on the Chicago & North Western Railway was 155 miles. We have the shortest

*This testimony also appears in the Hearings on H. R. 3400 (76th Cong., 1st Sess.) page 136.

average length of haul of any major trunk line operating in the western territory.

"We have large terminal investments in Chicago, Milwaukee, Sioux City, Omaha, and elsewhere in proportion to the size of the city or community.

"With an average length of haul of but 155 miles and heavy terminal expenses on a considerable portion of our traffic, any additional shrinkage in our revenue brought about by being forced to establish additional routes would add a further burden that would be very serious."

On the same subject, and speaking for the Great Northern Railway, Vice President F. R. Newman, testified at the hearings on S. 1261, at pages 117-118, as follows:*

"We have also invested large sums in terminal facilities in anticipation of obtaining a reasonable haul on the freight using such facilities. For example, investments in ore docks and merchandise docks at lake and ocean ports, and to be deprived of the long haul on freight using such facilities would wipe out or seriously reduce the value of such investments or the incentive to make future investments.

* * * * * * * * *

"At Seattle there is an investment of $1,000,000 in ocean dock for developing and handling the trade between the United States and the Orient, but if we were required to turn over import freight to connections at Spokane, approximately 400 miles away, or to the Soo Lines at Minot rather than our long haul through Minneapolis and St. Paul, such trade development would be less enthusiastic."

(4) *Avoidance of interchange expense incident to multiple-line hauls.*

Vice President Hastings of the Santa Fe railway system testifying at the hearings on S. 1261, p. 109, dealt with this subject in part as follows:†

* This testimony also appears in the printed Hearings on H. R. 3400, pages 115-116.

† Also reported in the Hearings on H. R. 3400, p. 106.

"It is obvious and axiomatic that it is *more economical and efficient* to handle traffic between two points over one line in lieu of two or more different lines, involving the delays and expense incident to interchange of traffic, where the single line is reasonably direct." (Italics inserted.)

Mr. E. W. Soergel, Assistant Freight Traffic Manager of the Chicago, Milwaukee, St. Paul & Pacific Railroad, at the same hearings* made the following statement on this bill:

"The *establishment of a joint route for traffic that a one-line route can handle without undue circuity is an economic waste because joint traffic is more expensive to handle than is local traffic and the greater the number of carriers in a joint route, the greater the expense.* I think one of the troubles today is that there are *too many joint hauls* and rather than add to them the trend should be toward curtailment. A single-line haul of 500 miles, 1,000 miles, or 1,500 miles requires two terminal services. Add just one other line and four terminal services are necessary. On 3-line hauls we have 6 terminal services, 4-line hauls, 8 terminal services, and 5-line hauls, 10 terminal services. Multiple-line routes are much more expensive not only because of the extra terminal service, but because of delays to equipment at interchange points, extra accounting for apportionment of revenue, car records, and rental. The cost of originating and terminating traffic is high and it certainly is not unreasonable for a line having the traffic in its possession to take the longest possible haul on that traffic, providing the route is not unreasonably long, in order

*Hearings, S. 1261, p. 121. Also reported in Hearings on H. R. 3400, pp. 118-119.

to spread the high terminal costs over as many miles of its line as it is possible to do." (Italics inserted.)

The statement of Witness Lincoln of the Missouri Pacific Lines at the hearings on S. 1261, contains at page 135 a quotation from the report of the Federal Coordinator on this general subject which is highly informative.* The statement and quotation are as follows:

"The cost of transportation to the carriers is bound to be increased by adding unnecessary transfers from one railroad to another. This particular situation is quite thoroughly dealt with in the freight traffic report of Federal Coordinator Eastman, from which I quote the following:

"'Data indicate that the average rail carload moves approximately 11 percent farther than would be necessary if it were moved by a direct line route in common use. Some degree of circuity is inevitable so long as there are competitive routes, but the situation is not one which should be viewed with complaisance, since unquestionably the 11 percent additional service is reflected to a considerable degree in the rail cost. On the other hand, the most direct route is not always the most economical: grades, congested lines, or terminals and other operating characteristics are to be considered.

'Intercarrier traffic is the cause for a large amount of this waste of transportation, due to the number of routes usually kept for movements. This traffic would naturally seek the direct route if it were not for competitive carrier effort to deflect it—a condition which, from the standpoint of the individual railways involved, may seem in many cases actually vital to their interest. From the wider public standpoint, it would be cheaper to give a direct subsidy

* Also reported at pp. 132-133 of printed Hearings on H. R. 3400.

to protect those interests than it is to provide the subsidiary indirectly plus the waste entailed.*

'The policy of wide-open carrier routes, however, has developed evils which outweigh these conceded benefits:

'(1) the weapon in the shipper's hands can be, and increasingly in the past few years has been, used as a club by which to compel carriers to grant rate reductions or adjustments, instead of submitting such demands to the Commission.

'(2) The practice leads to prolixity and complexity in tariffs to avoid indefiniteness.

'(3) The policy encourages circuitous routing.

'(4) The policy has greatly increased the necessity, intensity, and expense of off-line solicitation.

'(5) The policy leads to wasteful methods of operation by increasing the number of points at which interchanges are made by greatly increasing the number of interchanges themselves, and by discouraging through intercarrier train operations.'†

Further quoting:

'Competition in service would be no less effective if, for a given movement, there were only three or four direct routes open instead of many thousand routes. With direct routes available, grouped into definite channels, the shipper's interest will be advanced by great acceleration in overall speed which results from the movement in through intercarrier trains, and also by the elimination of waste in

* Freight Traffic Report, Federal Coordinator of Transportation, Section of Transportation Service, May, 1935, Vol. 1, pp. 77-78; also included in statement of Harry Wilson at page 143 of printed Hearings on S. 1261 (Hearings, H. R. 3400, p. 140).

† Federal Coordinator's Freight Traffic Report, Vol. 1, p. 104; also included in statement of Harry Wilson at page 143 of printed Hearings on S. 1261 (Hearings, H. R. 3400, p. 141).

operating expenses which in the end are borne by the shipper'."*

To similar effect is the statement of Witness Wilson speaking for Eastern railroads, at the hearings on S. 1261, pp. 151-162:†

> "The examples which I have cited will indicate to you clearly that the *cost of operation* over a joint route using a short line as an intermediate line is greater than via the direct route, because the distance in most cases is longer, the separate cost of operation on the short line exceeds the cost of operation on a section of the through line of the same distance, and an additional railroad is injected into the route. Additional interchanges at junction points between carriers become necessary in such through routes, and each interchange is expensive, involving station and general office accounting, also switching of cars, and in the case of less-than-carload freight the freight has to be actually unloaded and reloaded at the interchange point." (Italics inserted.)

Witness Doss, representing numerous Southern railroads, with respect to the same feature testified at the hearings on S. 1261, pp. 163-164, in part as follows:‡

> "The facts are that, in actual practice, the result in the great majority of instances would be to increase both the length of the haul and the time in transit while at the same time taking away from one railroad the traffic which it has obtained and provided facilities for transporting and giving that freight to another railroad. This would also increase the ex-

* Coordinator's Freight Traffic Report, Vol. 1, p. 105; quoted in Hearings S. 1261, pp. 143-144 (Hearings, H. R. 3400, p. 141).

† Also reported in printed Hearings on H. R. 3400, p. 149.

‡ Also reported in printed Hearings on H. R. 3400, pp. 159-160.

penses of both lines, due to the additional interchange of freight which would be necessary, the increase of time in transit, and the increase of opportunities for damage to lading and consequent claim payments.

"*The shortening of a route in point of mileage, if accomplished by the insertion of additional participating railroads and multiplication of the number of interchanges between railroads, does not necessarily reduce the length of time in transit.* On the contrary it almost always increases it." (Italics inserted.)

(5) *Promotion of efficiency and economy in operation.*

Witness Soergel of the Chicago, Milwaukee, St. Paul & Pacific, further speaking against Bill S. 1261, which would have eliminated the short-hauling provision, stated in part at page 120 of the printed Hearings thereon:*

"Its passage will increase operating expenses, prevent economical operation, and entail considerable loss in revenue."

Subsequently, at page 122† the same witness made the following significant statement:

"Considerable thought is now being given to the consolidation of railroads into a fewer number of systems with the object in view of *more economical operation*, but what is proposed here is diametrically opposed to that idea, for instead of a concentration of traffic, it is a dispersion of traffic, scattering it via widely different routes and in reality making *less efficient the entire plant of the trunk-line carriers.* Adding a new route here and a new route there may not in each instance mean a great deal in and of itself, but when the aggregate is taken into consideration, it will have a very disastrous effect and more

* Hearings H. R. 3400, p. 118.
† Hearings H. R. 3400, p. 120.

and more light traffic density lines will have to be abandoned because of the necessity of sharing with other railroads a portion of the revenue accruing from such traffic that in all justice should be retained by the trunk-line carrier." (Italics inserted.)

A further illustration of the point is contained in the following from the statement of Witness Wilson, presented as a witness by the principal eastern railroads at the Hearings on S. 1261 (p. 148):*

> "The *railroads are striving to practice economy in operation.* They are being exhorted to do so by the Interstate Commerce Commission and others in public office and the passage of this bill enabling the arbitrary fixing of joint, uneconomical routes by the Commission *would not be in the interest of operating economy or of the shipping public,* nor would it in any sense be in the public interest." (Italics inserted.)

Further, at page 149,† speaking of the report of Division 4 of the Commission in the first Stickell case,‡ the witness referred to

> "* * * the lack of consideration in that case as to whether the route comprising four lines of railroad as against one line was an economical one or not, or whether it actually took money out of the pockets of the carriers, thereby increasing their operating costs, which always has to be met by the shipping public if the railroads are to survive. * * *".

The primary stress placed by the railroad witnesses on the tendency of the short-haul provision to promote efficiency and economy operation in the interest of the

* Hearings H. R. 3400, p. 145.
† Hearings H. R. 3400, p. 147.
‡ Stickell & Sons *v. W. M. Ry. Co.,* 146 I. C. C. 609 (1928).

general public is further illustrated by Mr. Wilson's summary of his statement on this occasion. Thus, in urging that the committee reject S. 1261 which would have repealed the short-haul provision, he stated at pages 154-155 of the printed Hearings:*

"Finally I have endeavored to show the committee—

"First, that the Interstate Commerce Commission should not be clothed with unlimited authority to establish joint through routes or to short-haul carriers and that it is not necessary that it be given this authority and that it is *not in the interest of economical railroad operation or of the public at large.*

"Second, that the short lines have no just claim to be injected into through routes when the operation of such through routes is not in the interest of all the carriers involved from the standpoint of net revenue.

'Third, *that to establish joint through routes for the purpose of affording transit privileges at points on an intermediate railroad is not in the public interest where the net revenue to the carriers is thereby reduced.*" (Italics inserted.)

(6) *Unnecessary injection of short lines in through routes.*

With respect to this consideration as a justifying reason for retaining the short-haul rule, Vice President Hastings of the Santa Fe, testifying at page 115 of the Hearings on S. 1261,† stated as follows:

"A good many of the Commission's decisions in recent years in routing cases and in division cases seem to have been based on the need of some carrier rather than on the service it renders the public. Now, if our

* Hearings H. R. 3400, p. 152.
† Hearings H R. 3400, pp. 112-113.

road, which we think is solidly financed, ably managed, and has spent hundreds of millions of dollars in developing the West, is to be used financially to carry lines that might not otherwise survive, if that is the policy of Congress or the Commission, I think a good deal of the traffic would be diverted away from us. That is what I fear."

*

Speaking for the principal eastern railroads, Mr. Harry Wilson dealt with this subject at page 152 of the printed Hearings on S. 1261 (Hearings H. R. 3400, pp. 149-150):

"Now, in making those divisions on local traffic to and from points on short-line railroads, consideration is given to all of the questions involving the necessities of the short-line railroads for revenue.

"Now, the short lines having accomplished that, are coming here and asking you to sanction by law that which will permit them to take from the through lines some additional money by injecting them into through routes, and in every case where that is done—in most cases where that is done, at least—*it will increase the cost of operation and reduce the net income to the railroads.*

"What I have said about the use of short lines as intermediate routes applies also to trunk lines; that is, the larger railroads voluntarily short haul themselves in many cases where a joint route formed of two or more trunk lines affords *economical operation*, but this is quite different than being compelled by an administrative body to establish such routes *regardless of their uneconomic character.*

"It is well known that many of the short lines were built for specific purposes, such as to take out coal, lumber, ores, and other commodities, which were located on their lines in large quantities, and many

of the branch lines of the trunk-line carriers were built for like purposes. At this point, however, the similarity ceases because when the traffic on the branch line of the trunk line, for which it was constructed, has come to an end the trunk line asks the Commission to be allowed to abandon the line and write the loss off its books, while the short line in many cases wants to continue the operation of the property; and now they want the law changed so that they may demand from the trunk lines that they be made parties as intermediate carriers to through routes and be allowed a part of the earnings even though the cost of operation of such joint through routes is greater than the operation via the direct routes over trunk lines, thereby reducing the net return to the carriers, as a whole, which must be made up by the shipping public somewhere else." (Italics inserted.)